IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-5856

WINSTON M. HOLLOWAY,
RAY LEE WELCH and
GARY DON CAMPBELL — PETITIONERS

V.

STATE OF ARKANSAS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

HAROLD L. HALL
PUBLIC DEFENDER
Sixth Judicial District
601 West Second Street
Little Rock, Arkansas 72201

Counsel for Petitioners

SUBJECT INDEX

CASES — PAGE

OTHER AUTHORITIES

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The Petitioners', Winston M. Holloway, Ray Lee Welch and Gary Don Campbell, respectfully pray that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Arkansas, entered in the above entitled case on September 20, 1976.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 260 Ark. 250, 539 S.W. 2d 435. It is responded in Appendix "A" to this Petition.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered July 19, 1976. That Court entered final judgment upon denying rehearing September 20, 1976, a copy of which appears in Appendix "C". The jurisdiction of the United States is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the three defendants were denied effective assistance of counsel by the order of the Court appointing a Public Defender to represent them in the same trial over their objections?

2. Whether the defendants' trial in jail clothing destroyed their presumption of innocence so as to deny them a fair trial?

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

CONSTITUTION OF THE UNITED STATES, SIXTH AMENDMENT:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, * * * and to have the assistance of counsel for his defense.

CONSTITUTION OF THE UNITED STATES, FOURTEENTH AMENDMENT:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

CONSTITUTION OF ARKANSAS, ARTICLE 2, SECTION 10:

> In all criminal prosecutions the accused shall enjoy the right to a speedy trial and public trial by an impartial jury of the county in which the crime shall have been committed; * * * and to be heard by himself and his counsel.

STATEMENT OF THE CASE

Holloway, Welch and Campbell were each charged with two counts of rape and one count of robbery which occured in a restaurant in Little Rock, Pulaski County, Arkansas.

The Public Defender was appointed to represent all three petitioners over his objections due to a possible conflict of interest. Each of the petitioners filed a Motion for Severance and for separate counsel.

On September 4, 1975, the petitioners were brought into the Pulaski County Circuit Court for trial in their jail clothes and a jury was selected. On September 5, 1975, the jury returned a verdict of guilty against each petitioner and sentenced each of them to life imprisonment on each of the two charges of rape and to twenty-one years for robbery.

REASON FOR GRANTING THE WRIT

1. THE HOLDING OF THE SUPREME COURT OF ARKANSAS THAT AN ATTORNEY REPRESENTING MULTIPLE DEFENDANTS MUST OUTLINE TO THE TRIAL JUDGE CONFIDENTIAL INFORMATION THAT CONSTITUTES A CONFLICT OF INTEREST BETWEEN THEM IS JUDICIALLY UNSOUND AS VIOLATING THE RIGHT OF PRIVILEGED COMMUNICATION BETWEEN ATTORNEY-CLIENT.

Petitioners respectfully submit that they were denied effective assistance of counsel when the Public Defender was appointed to represent all three of them in their trial after each had discussed their case individually with him. This prevented the Public Defender from examining them as to matters they had confided in with him when they took the witness stand where it conflicted with information he had received from the other two when they took the witness stand.

Their rights could have been protected if the trial court had granted them a severance or appointed them separate counsel.

Counsel for petitioners filed a Motion for Severance for each of them: Holloway (Tr. 24-25), Welch (Tr. 26-27), and Campbell (Tr. 28-29).

On August 13, 1975, counsel for petitioners filed a Motion for Separate Counsel for each petitioner (Tr. 31) because the petitioners stated that there was a possibility of a conflict of interest in each of their cases. The Motions for Severance and Separate Counsel were overruled by the Court on August 19, 1975 (Tr. 32).

On the date of trial, counsel for petitioners renewed his motions as follows:

MR. HALL: At this time I would like to renew that motion on the ground that one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them.

THE COURT: I don't know why you wouldn't. Overruled. Save your exceptions (Tr. 121).

The following occurred when the defendants stated that they wished to testify:

MR. HALL: I am in a position now where I am more or less muzzled as to any cross-examination.

THE COURT: You have no right to cross-examine your own witness.

MR. HALL: Or to examine them.

THE COURT: You have a right to examine them, but you have no right to cross-examine them. The prosecuting attorney does that.

MR. HALL: If one takes the stand, somebody needs to protect the other two's interest while that one is testifying, and I can't do that since I have talked to each one individually.

* * * *

THE COURT: You are overruled. Each defendant said he wants to testify, and there will be no cross-examination of these witnesses, just a direct examination by you (Tr. 239-240).

Counsel for defendants was prevented from cross-examining each defendant when they testified, and, therefore, was unable to protect the interests of the other two defendants. The following took place when the defendant, Welch, testified:

DEFENDANT HOLLOWAY: Your Honor, are we allowed to make an objection?

THE COURT: No, sir. Your counsel will take care of any objections.

MR. HALL: Your Honor, that is what I am trying to say. I can't cross-examine them.

THE COURT: You proceed like I tell you to, Mr. Hall. You have no right to cross-examine your own witnesses anyhow (Tr. 255-256).

Petitioners respectfully submit that they were denied effective assistance of counsel when the Public Defender was appointed to represent all three of them in their trial after each had discussed their case individually with him. This prevented the Public Defender from cross-examining one defendant on behalf of the other two defendants after he had received confidential information from the defendant testifying.

The majority opinion of the Arkansas Supreme Court was in error in holding that the confidential information the Public Defender received from the defendants should have been outlined to the judge for him to evaluate its relevance.

An obvious divergence of interest exists between a defendant who denies his guilt and a co-defendant who not only confesses his own complicity but also accused the other of participation in the allged crime, held the court in Sawyer v. Brough, 358 F. 2d 70, especially where the implicating confession attempts to cast most of the blame for the alleged crime onto the "other party." * * * The Court said that under these circumstances it would be utterly impossible for one attorney to effectively serve the conflicting interests of both defendants, since he would be rendered impotent to effectively assist one by the necessity of protecting the other.

Where defendant A testified that he had relied on defendant B's representation that certain property had not been stolen and where defendant B testified as to a similar reliance on defendant A's representations, and where both defendants denied participation in the burglary and larceny alleged, the court in United States ex rel, Watson v. Myers, 250 F. Supp. 292, held that there could be no doubt that the interests of the co-defendants were conflicting. Pointing out that defendant A's case would, for example, have required the impeachment of defendant B's testimony, but that defendant A was testifying on his own behalf on direct examination by his and defendant B's joint counsel, the court concluded that to impeach him simultaneously would be an impossibility for any advocate.

The Sixth Amendment right to effective assistance of counsel includes the right to a lawyer who is not obliged to serve conflicting interests at the same time.

In State v. Brazile, 226 La. 254, 75 So. 2d 856, the court reversed and remanded a first degree murder conviction because the trial court failed to appoint separate counsel for each of the co-defendants, where the appointed counsel had argued to the trial court that he was unable to represent both accused to the degree of efficiency required in a capital criminal case in that he was unable to plead mitigation of one defendant for fear of prejudicing the other.

To be properly armed, the attorney must be fully apprised of the facts upon which his client's case is based. The client must be able to freely disclose those facts without fear of his counsel cross-examining him with it for the benefit of a co-defendant.

2. THE ARKANSAS SUPREME COURT'S HOLDING THAT ANY VIOLATION OF CONSTITUTIONAL RIGHTS OF THE DEFENDANTS AFTER THEY WERE PARADED THROUGH THE COURT ROOM IN FRONT OF THE PROSPECTIVE JURORS IN THEIR JAIL CLOTHES WAS CORRECTED BY THE TRIAL COURT WHEN HE OFFERED TO LET THEM CHANGE BEFORE THE SELECTION OF THE JURY.

Before court was formally opened on the first day of the trial, and while the prospective jurors were present, the petitioners were brought into the courtroom and seated at

counsel table in their "jail garb" or clothing. For the record, the jail clothing was described as matching blue trousers and blue shirts. One of the defendants couldn't put his shirt in because his zipper wouldn't close (T. 126).

The following proceedings took place when the Public Defender moved for a mistrial:

> THE COURT: What is your motion?
>
> MR. HALL: Your Honor, I want to ask for a mistrial now for the defendants being paraded through the courtroom in their jail uniforms where all of the prospective jurors were seated.
>
> MR. MUNSON: Your Honor, I think this can be cured very simply by telling the jury that they are in custody of the County and these are not prison clothes.
>
> THE COURT: These are not penitentiary men. Overruled. Save your exceptions. These boys have not been convicted. Right now they are presumed to be just as innocent as you or I. But I don't even have to let them dress in their civilian clothes if I don't want to. I can't try a man with a big number across his chest because they will know he is in the penitentiary then.
>
> MR. HALL: Save my exceptions to the Court's ruling.
>
> THE COURT: Your exceptions are saved (T. 119-120).

The petitioner, Holloway, filed a petition while he and his co-defendants were in chambers on the above motion for mistrial alleging that he was denied the use of clippers for a haircut and further "being denied use of personal clothing and or even clean clothing, creating an unfavorable appearance by wearing jail uniforms." (T. 121-122).

In Miller v. State, 249 Ark. 3, 457 S.W. 2d 848, the Arkansas Supreme Court, in reversing the same trial court held:

> "We conclude that a continuance should have been granted to allow Appellant a reasonable time in which to make arrangements for civilian attire. That is because of the rule, supported by a strong majority, that absent a waiver accused should not be forced to trial in prison garb."

In the Miller case, supra, the Supreme Court of Arkansas cited 21 Am. Jur. 2d Criminal Law §239 which stated:

> "Since the defendant, pending trial, is still presumed innocent, he is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require. He is therefore entitled to wear civilian clothes rather than prison clothing at his trial. It is improper to bring him into the presence of the jury which is to try him, or the venire from which his trial jury will be drawn, clothed as a convict."

In the case of Estelle v. Williams, 425 U.S. _____, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976), it was held that the State cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes. The failure to make an objection to the court as to being tried in such clothes negates the presence of the compulsion necessary to establish a constitutional violation. The court went on to say that ". . . Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system." Gaito v. Brierly, 485 F. 2d 63 (CA 3 1973); Hernandez v. Belo, 443 F. 2d 634 (CA 5), cert. denied, 404 U.S. 897 (1971); Brooks v. Texas, 381 F. 2d 619 (CA 5 1967); Commonwealth v. Keeler, 216 Pa. Super. 193, 264 A. 2d 407 (1970); Miller v. State, 249 Ark. 3, 457 S.W. 2d 848 (1970); People v. Shaw, 381 Mich. 467, 164 N.W. 2d 7 (1969); People v. Zapata, 220 Cal. App. 2d 903, 34 Cal. Rptr, 171 (1963); cert. denied, 377 U.S. 406 (1964); Eaddy v. People, 115 Colo. 488, 174 P. 2d 717 (1946).

Gaito v. Brierly, 485 F. 2d 86 (1973) involved a prisoner who was brought to trial in prison garb consisting of matching brown denim shirt and pants, work shoes, and a heavy dark brown corduroy coat. The Court followed Miller, supra, and stated:

> "We accept the majority view that compelling a defendant to appear before a jury in his prison clothes unconstitutionally infringes his due process right to be presumed innocent until proven guilty."

In Brooks v. Texas, 381 F. 2d 619 (1967), the Court held:

> ". . . that it is inherently unfair to try a defendant for a crime while he is garbed in his jail uniform, especially when his civilian clothing is at hand; no insinuations, indications or implications suggesting guilty should be displayed before the jury, other than admissible evidence and permissible argument."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District . . ."

The Fourteenth Amendment to the Constitution of the United States provides:

> ". . . no State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive process of law, nor deny to any person within its jurisdiction equal protection of the laws."

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HAROLD L. HALL
PUBLIC DEFENDER
Sixth Judicial District
601 West Second Street
Little Rock, Arkansas 72201

Attorney for Petitioners

APPENDIX "A"

SUPREME COURT OF ARKANSAS

NO. CR76-25

WINSTON M. HOLLOWAY, RAY LEE WELCH, AND GARY DON CAMPBELL, Appellants	)	Opinion Delivered: July 19, 1976
V.	)	APPEAL FROM PULASKI CIRCUIT COURT, FIRST DIVISION, WILLIAM J. KIRBY, JUDGE
STATE OF ARKANSAS, Appellee	)	AFFIRMED

CARLETON HARRIS, Chief Justice

Appellants, Winston Holloway, Ray Lee Welch, and Gary Don Campbell, were charged by information with robbery of the Leather Bottle Restaurant in Little Rock on June 1, 1975, and with the use of a firearm in committing the offense. The three men were further charged with the rape of two female employees of the restaurant. Following a jury trial, all three men were convicted, with punishment for each set at 21 years imprisonment for the robbery, and life imprisonment for rape. From the judgment so entered, Holloway, Welch, and Campbell appeal, arguing several points for reversal.

For convenience, we first discuss the last point which is simply that the court erred in not giving instructions for directed verdicts of acquittal. While appellants concede that any possible error was cured by the giving of the state's instruction defining an accessory, we proceed to a discussion of the contention as a matter of providing background for other points asserted.

Other than the identity of the perpetrators, the facts about the robbery-rapes are not disputed. After the closing of the Leather Bottle on June 1, around 1:30 - 1:45 A.M., five employees had remained in the restaurant, and were preparing to leave. The employees were Donald Henry, Michael Garrett,

David Carroll, and two women. All five were in the restaurant office in the lower part of the building.

As one of the women (hereafter called "first woman") began to leave, she heard someone running down the stairs toward the office. When she looked, she saw a man -- whom she subsequently identified as appellant Holloway -- coming down the stairs, brandishing a .45 caliber automatic pistol. She also saw two other men at the top of the stairs. Holloway forced her back into the office at gunpoint, where he herded her and the four other employees against the wall, threatening to kill them if they moved or opened their eyes. At this point one of the employees, Donald Henry, saw appellant Welch, also in the office, rifling the other woman's (hereafter called "second woman") purse.

While one of the other men remained in the office with the employees, Holloway grabbed the second woman by the arm and took her outside, to the stairs, where he forced her to disrobe, and then raped her. She was thereafter raped a second time by another man, but was unable to identify the assailant. Holloway subsequently returned to the office and asked which employee could open the safe. David Carroll, manager of the restaurant, said that he could, and Holloway directed him to do so. While this was occurring, another of the three men came into the office and forced the first woman out to the stairs, where he took all the money from her purse, and then raped her at gunpoint.

Subsequently, after getting all the available cash from the safe, the three men again made all the employees face the office wall, eyes closed, while they "shot out" the telephones with gunshots. The employees were then grouped into the restaurant's walk-in freezer, which was then locked. After about an hour -- around 3:30 A.M. -- one of the employees, Michael Garrett, escaped from the freezer by a small service opening, and released the others. The police were called, and the women taken to a doctor.

Because the robbers kept them facing the wall, and instructed them to keep their eyes closed, none of the employees were able to identify all three men. The first woman and Donald Henry identified Holloway and Welch. Michael Garrett could identify only Holloway. The second woman and David Carroll identified Holloway and Campbell.

In addition to the testimony of the five employees, the state also presented evidence of a statement given by appellant Campbell to two police officers, Paul Plummer and Jerry Best. The officers testified that on July 4, 1975, they received information that appellant Campbell was being held in the city detention center, under the alias Robert Hill. They removed Campbell from detention, showed him a warrant charging him with robbery, and began taking him to an interrogation room. At this point both officers testified Campbell spontaneously said, "I haven't raped anyone. I will tell you about the robbery." The officers said that they cautioned Campbell to stay silent, because he had not been warned of his rights, but that he immediately volunteered the same statement again.

Thereafter Campbell was warned of his constitutional rights, and both officers stated that he signed a "rights waiver," which was admitted into evidence. Plummer and Best testified that Campbell then told them that he, Welch and Holloway had robbed the establishment. The officers said that Campbell admitted complicity in the robbery, but denied raping anyone, stating that he had held a rifle and had stood at the top of the stairs. In the oral statement Campbell said that the men had stolen about $2,000.00, and that his share of the money was approximately $700.00. It is apparent

that, aside from the concession, the court did not err in refusing to instruct directed verdicts of acquittal.

Appellants contend that the trial court "erred in refusing to grant a mistrial when the defendants were brought in court before the jury in their jail uniforms in violation of their rights under the Sixth and Fourteenth Amendments to the Constitution." Before the trial began, counsel for appellants moved for a mistrial, alleging that appellants were "paraded through the courtroom in their jail uniforms where all the prospective jurors were seated." The record does not reflect whether any of the prospective jurors ever saw appellants prior to the trial. Nor does the record reflect the exact attire of the men except that they were dressed in matching blue trousers and blue shirts. Certainly, they were not wearing "prison garb," for they were not in prison.

Appellants' argument has no merit, for several reasons. First, appellants rejected, twice, the trial court's offer to allow them to change clothes. The trial court gave appellants this opportunity before the trial began and before the actual selection of the jury. Therefore, appellants may be deemed to have waived the point. Finally, in the recent case of Estelle v. Williams, _____ U.S. _____, (May 3, 1976), the U. S. Supreme Court held that a defendant's constitutional rights were violated only when he was compelled to wear identifiable prison clothing at his trial. The court stressed that such attire must be "distinctive" and "identifiable."

It is asserted that the court erred in refusing to grant appellants' motion for a severance, and in not appointing separate counsel. Prior to the trial, all three appellants moved for severance, and for appointment of separate counsel. As grounds for severance, each asserted that witnesses might be called by one of the defendants to testify against the other defendants, that a joint trial would deprive each appellant of his rights to call the co-defendants as witnesses, and that a joint trial would prevent counsel from commenting on the failure of any co-defendant to testify, if such occurred. The motion for separate counsel alleged only that the appellants had stated to counsel that "there is a possibility of conflict of interest in each of their cases." The motions were denied.

Appellants' counsel renewed the motion for separate counsel at the trial, stating that "one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them." The trial court denied the motion.

First, let us review the contention that a severance should have been granted. Let it be pointed out that appellants demonstrate no prejudice from the joint trial. As previously noted, three grounds were alleged in the motion for severance. None of these grounds materialized during the trial. Moreover, the trial court properly limited the use of Campbell's statement against co-defendants by deleting all references by name to the other two defendants, and substituting the words, "two other people" and "two other fellows." This procedure fully complied with this Court's requirement. Gammel and Spann v. State, 259 Ark. _____, 531 S.W. 2d 474 (Jan. 19, 1976); Stewart and McGhee v. State, 257 Ark. 753, 519 S.W. 2d 733, cert. denied, 423 U.S. 859. In fact, it was counsel for appellants who stated before the jury that the confession implicated the two co-defendants.

As this court has held numerous times, "[t]he granting of a severance is within the sound discretion of the trial court." Keese and Pilgreen v. State, 223 Ark. 261, 265 S.W. 2d 542; Vault v. Adkisson, 254 Ark. 75, 491 S.W. 2d 609. We

Next, let us review the point that separate counsel should have been appointed. The applicable law was discussed in Trotter and Harris v. State, 237 Ark. 820, 377 S.W. 2d 14, cert. denied, 379 U.S. 890. In a lengthy discussion the court reviewed the relevant precedents, and held that no conflict of interest had arison because counsel represented the two co-defendants. The court stated:

> "Both men were charged with the same offense, which grew out of the same occurrence. The only evidence, which in any manner could be said to indicate a conflict of interest, was the statement of Harris made to the sheriff that, though he drove the car, he did not actually rape the prosecuting witness. This might indicate that he was only an accessory, but the distinction between principals and accessories was abolished in this state in 1936. See Ark. Stat. Ann. §41-118 (1947). Accordingly, even under this statement, if Harris were guilty, he was guilty as a principal."

The court also noted that the trial court had correctly limited the use of the statement, and that both Harris and Trotter received the same sentence, indicating that neither had been prejudiced as against the other by the statement.

Thus, the instant case presents facts identical in important respects to Trotter. Appellants "were charged with the same offense, which grew out of the same occurrence." Although Campbell's statement did deny any involvement in the rapes, as did the statement in Trotter, this denial had no effect on his guilt as a principal. The trial court likewise limited the use of the statement against the co-defendants, and all appellants did, in fact, receive the same sentence. Under the Trotter standard, therefore, no conflict of interest has been shown.

This conclusion is in accordance with the overwhelming majority of courts that have ruled upon the issue -- i.e., the record must show some material basis for an alleged conflict of interest, before reversible error occurs in single representation of co-defendants.[1] In a particularly definitive case, United States v. Williams, 429 F. 2d 158, cert. denied, 400 U.S. 947, the Eighth Circuit stated:

> "It has been firmly established that joint representation of codefendants is not per se violative of the Sixth Amendment. [Citations omitted.] Expressed another way, no reversible error is committed by the district court in assigning a single attorney to represent two or more codefendants in a pending criminal action, absent evidence of an actual conflict of interest or evidence pointing to a substantial possibility of a conflict of interest between the codefendants. [Citations omitted.] Where courts have found such evidence on the appellant record, they have not hesitated to direct a reversal for a new trial. [Citations omitted.]
>
> "...[T]here is nothing pointing to an actual or substantial possibility of a conflict of interest between appellant and his codefendant, Brinkley. We need go no further. A reversal here would be tantamount to a holding that joint representation is illegal per se, a result not mandated by the Sixth Amendment, Glasser [v. United States, 315 U.S. 60], or its progeny."

Similarly, in United States v. Gallagher, 437 F. 2d 1191, the Seventh Circuit, confronted with the same argument, found no conflict of interest, and stated:

> "The existence of a conflict of interest, to warrant [reversal], must be founded on something more than mere speculation or surmise. We perceive nothing in this record which demonstrates the existence of any real conflict of interest between the defendants."

Research discloses at least thirty-two jurisdictions that adhere to this standard, requiring some factual demonstration of a conflict of interest.

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[1] In American-Canadian Oil and Drilling Corp. v. Aldridge and Stroud, 237 Ark. 407, 373 S.W. 2d 148, this court expressly held that a mere possibility of conflicting interest does not disqualify an attorney per se. The court stated:

> "A mere possibility that different interests represented by an attorney might develop a conflict is not sufficient to disqualify him."

The Court held that the interests must be actually adverse.

By contrast, a small minority of jurisdictions (five) appear to have adopted a much more liberal standard first applied by the District of Columbia Court of Appeals in United States v. Lollar, 376 F. 2d 243. Under the Lollar rule, the trial court bears the burden of investigating any potential conflict of interest, and of determining the need for separate counsel, whenever any "informed speculation" of conflict exists. Although this rule was first announced almost a decade ago, very few jurisdictions have found it persuasive. For example, in United States ex rel. Robinson v. Housewright, 525 F. 2d 988 (Nov. 26, 1975), the Seventh Circuit expressly rejected the Lollar standard for appointment of separate counsel. That court stated that "the primary responsibility for the ascertainment and avoidance of conflict situations must lie with the members of the bar," and that "it is incumbent upon the defendants to demonstrate, with a reasonable degree of specificity, that a conflict of interests actually existed at trial." Likewise, in State v. Jeffrey, 515 P. 2d 364, the Montana Supreme Court refused to adopt the Lollar rule, adhering instead to the majority requirement "that there be a showing of a conflict of interest to the prejudice of the accused, and that this conflict must be more than a mere conjecture as to what might have been shown."

Although this court referred to the "informed speculation" rule when reversing a conviction in Shelton v. State, 254 Ark. 815, 496 S.W. 2d 419, it cannot be presumed that Shelton overruled Trotter and Harris v. State, supra. In fact, the Shelton opinion does not discuss, or even mention Trotter. In Shelton, there were no co-defendants. A witness, Joe Hilderbrand, had been a defendant but the case against him had been dismissed. It was contemplated that the state might call Hilderbrand as a witness and counsel for Shelton stated that he had represented Hilderbrand, had received confidential information from him, and would not feel free in cross-examining Hilderbrand if he were called to testify. A principal difference in that case and the one at bar is that Shelton never did take the stand and testify.

A recent case, United States v. Jeffers, 520 F. 2d 1256 (7th Cir.), cert. denied, 96 S. Ct. 805 (Jan. 13, 1976), discusses the proper procedure to be followed when an alleged conflict of interest may arise because counsel possesses confidential information. The opinion was written by Justice (then Judge) John Paul Stevens. In Jeffers, counsel for multiple defendants asserted that he was unable to fully cross-examine a prosecution witness whom his law firm had previously represented. Counsel allged that because of this prior representation, he was in possession of confidential information that created a conflict of interest, limiting his effectiveness in representing the Jeffers defendants. He requested that the trial court permit him to withdraw from the case because of the presumed conflict. The trial court held, however, that no actual showing of a conflict had been made, and that therefore counsel would not be permitted to withdraw.

On appeal of the ensuring convictions, the Seventh Circuit in Jeffers approved the trial court's ruling. Judge Stevens first noted that counsel "made no effort to disclose the privileged information to the court in camera to enable the court to evaluate its relevance." Reviewing the scope of the attorney-client relationship, the court further stated that "[t]he risk that an item of confidential information might be misused does not create a conflict of interest which disqualifies an attorney from conducting any cross-examination at all." The court concluded:

> "Thus, if defense counsel was concerned that he might be using confidential information improperly, he could have outlined the nature of the information to the judge and, if necessary, made an in camera disclosure to him. On the basis of such a disclosure it might have become apparent that the privilege was either inapplicable or had been waived by the witness. Or, it might have been clear that the information was not usable for other evidentiary reasons."

In the instant case, no disclosure of the nature of the information acquired was outlined to the judge. After all, without any reflection on present counsel, a very honorable man and competent lawyer, requiring the granting of a motion to appoint separate counsel purely on the basis of a motion stating that confidential information had been received from the defendants, might well eventuate in an imposition on the court and could result in the mandatory appointment of additional counsel in every case where multiple defendants were involved; the contingencies set forth in Jeffers might well dispose of the issue.

Summarizing, a review of the record establishes that no prejudice resulted, in fact, to appellants. As the state correctly points out, all three appellants voluntarily took the stand, against the advice of counsel, and denied any involvement in the crime. Most important, however, none of the appellants attempted to incriminate any of the others. Campbell completely denied making the statement to the officers, and denied even knowing Holloway at all. Holloway and Welch both stated that they knew nothing about the case. Thus, the actual testimony adduced at trial by appellants presented no conflict of interest whatsoever. Accordingly, the record presents no basis from which this court can find that separate counsel should have been appointed. This conclusion agrees with the holdings of other courts in similar fact situations. People v. Spencer, 206 N.W. 2d 733 (Mich. App.); Davis v. State, 201 S.E. 2d 345 (Ga. App.).

Appellants assert that the trial court erred by admitting into evidence the "rights waiver" allegedly signed by Campbell, and the oral statement allegedly made by him to police. Campbell denied signing the form and making the statement, contending that he was under the influence of alcohol and narcotics at the time.

In reviewing a trial court's ruling on the admissibility of a statement, this court makes an independent determination based on the totality of the evidence, but reverses the trial court only when its ruling is clearly against the preponderance of the evidence. Degler v. State, 257 Ark. 388, 517 S,W. 2d 515. The ruling of the trial court in the instant case clearly is not against the preponderance of the evidence. Both officers who were present during Campbell's interrogation testified that he was not visibly under the influence of drugs or alcohol, that he could walk and talk normally, and appeared sober. Both officers said that they could smell alcohol on Campbell, and gave him a "breathalyzer" test, but that Campbell's mental faculties were not apparently impaired. The conflicting testimony posed an issue of credibility for the trial court, and from the appellate record it cannot be said that error was committed in admitting the rights form and oral statement.

Appellants argue that the trial court erred by refusing to allow their counsel to ask one of the officers who had interrogated Campbell about the statutory presumption on blood alcohol content. The officer testified that a "breathalyzer" test given to Campbell "showed that he registered point 16 percent blood alcohol." Appellants' counsel then asked, "And what is the percentage reading for a drunk?" The trial court at that point sustained the state's objection to the question.

The prima facie presumption of intoxication set forth in Ark. Stat. Ann. §75-1031.1 (Repl. 1957) applies solely to individuals who are charged with the offense of driving a vehicle while intoxicated. As the state points out, the statute is relevant solely to the issue of an individual's ability to drive safely -- his reactions, coordination, and capacity to operate an automobile. Appellants cite no authority that a statute with such a limited purpose should be applied to the vastly different issue of a defendant's mental ability to comprehend his constitutional rights and to give a statement. To the contrary, see Wilson v. Coston, 239 Ark. 515, 390 S.W. 2d 445; Hoffman v. State, 70 N.W. 2d 314 (Neb.); People v. Leis, 213 N.Y.S. 2d 138; State v. Aarhus, 128 N.W. 2d 881 (S.D.). The argument, we think, is untenable.

Finally, it is asserted that "The court erred in permitting officers to testify that they took a picture of defendant, Campbell, and a warrant for his arrest when they went to the jail to talk to a man by the name of Robert Hill." During the examination of Jerry Best, one of the officers who had questioned Campbell, Best testified that he and Plummer had taken "a picture of Campbell and a warrant that we had for him" when they went to retrieve him from the detention center.[2] Appellants' counsel objected and requested a mistrial, which the trial court denied. Appellants contend that the refusal of a mistrial was error, because the officer's testimony allegedly created "an impression to the jury that it was a mug shot of the defendant and could lead them to believe that he had a long record."

---

[2]Officer Plummer had received information that a man who had given his name as Robert Hill was being held in the detention center, but that "Hill" was actually Gary Don Campbell. Campbell had been previously convicted of an offense and the officers took his picture to the detention center as a matter of being positive that "Hill" and Campbell were one and the same.

It must be noted that the officer used the word, "picture," and made no reference to a "mug shot." The word used by the officer seems in no way prejudicial to appellants; further, no request was made for an admonition to the jury. The applicalbe standard is stated in Gammel and Spann v. State, 259 Ark. _____, 531 S.W. 2d 474:

> "Declaring a mistrial is an extreme remedy which should be granted only where there has been an error so prejudicial that justice could not be served by continuation of the trial. [Citation omitted.] It should not be granted when any possible prejudice could be removed by an admonition to the jury. [Citation omitted.] It was certainly not called for in this case. Appellants did not seek an admonition to the jury to disregard the questions or any of their implications."

Still further, Plummer had already earlier testified to the same facts without objection, and any possible error would be rendered harmless.

All objections made during the trial by appellants have been examined and found to contain no merit. Finding no reversible error on the whole case, the judgment is affirmed.

It is so ordered.

George Rose Smith, Fogleman & Byrd, JJ., dissent.

SUPREME COURT OF ARKANSAS

WINSTON M. HOLLOWAY, RAY LEE WELCH, AND GARY DON CAMPBELL, Appellants	)	No. CR76-25
	)	Opinion Delivered: July 19, 1976
V.	)	
STATE OF ARKANSAS	)	Dissent

CONLEY BYRD, Associate Justice

I would reverse this case because the trial court forced the public defender to represent all three defendants after he, in accordance with American Bar Association Standards For Criminal Justice, The Defense Function §3.5(a)(1971), informed the court that, because of a confidential communication from his clients, there was a conflict of interest among them. The record with respect to the conflict issue shows the following:

> "MR. HALL: At this time I would like to renew that motion on the ground that one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them.
>
> THE COURT: I don't know why you wouldn't. Overruled. Save your exceptions.
>
> . . .
>
> MR. HALL: I am in a position now where I am more or less muzzled as to any cross-examination.
>
> THE COURT: You have no right to cross-examine your own witness.
>
> MR. HALL: Or to examine them.
>
> THE COURT: You have a right to examine them, but you have no right to cross-examine them. The prosecuting attorney does that.
>
> MR. HALL: If one takes the stand, somebody needs to protect the other two's interest while that one is testifying, and I can't do that since I have talked to each one individually.
>
> THE COURT: You are overruled. Each defendant said he wants to testify, and there will be no cross-examination of these witnesses, just a direct examination by you."

* * *

The record shows that all defendants testified in their own behalf. The following took place when the defendant, Welch, testified:

> "DEFENDANT HOLLOWAY: Your Honor, are we allowed to make an objection?
>
> THE COURT: No, sir. Your counsel will take care of any objections.
>
> MR. HALL: Your Honor, that is what I am trying to say. I can't cross-examine them.
>
> THE COURT: You proceed like I tell you to, Mr. Hall. You have no right to cross-examine your own witnesses anyway."

The oath administered to lawyers when they receive their license to practice law before this Court requires each lawyer to affirmatively answer that "I will maintain the confidence and preserve inviolate the secrets of my client... ." Disciplinary Rules DR 4-101(B) of the Code of Professional Responsibility, adopted by this Court provides:

> "(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

In the American Bar Association Project on Minimum Standards for Criminal Justice, Providing Defense Services, we find the following with reference to the professional independence of appointed defense counsel.

> "1.4 Professional independence.
> The plan should be designed to guarantee the relationship between lawyer and client. The plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice.

One means for assuring this independence, regardless of the type of system adopted, is to place the ultimate authority and responsibility for the operation of the plan in a board of trustees. Where an assigned counsel system is selected, it should be governed by such a board. The board should have the power to establish general policy for the operation of the plan, consistent with these standards and in keeping with the standards of professional conduct. The board should be precluded from interfering in the conduct of particular cases..

Commentary

a. Integrity of the professional relation

A system which does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain. Inequalities of this nature are seriously detrimental to the fulfillment of the goals of providing counsel. They are quickly preceived by those who are being provided representation and may encourage cynicism toward the justness of the legal system and, ultimately, of society itself. Much of the dispute concerning the merits of various systems has centered on their capacity to guarantee professional independence. The study made by the Special Committee of the Association of the Bar of the City of New York and the National Legal Aid Association concluded that the necessary independence could be guaranteed under any type of system, from public defender to assigned counsel, if and only if the system is properly insulated from pressures, whether they flow from an excess of benevolence or from less noble motivations. See EQUAL JUSTICE FOR THE ACCUSED 61, 67, 71, 74-75. The importance of assuring the undivided loyalty of defense counsel to his client has been emphasized in previously adopted standards."

To sustain its illogical position that "the record must show some material basis for an alleged conflict of interest, before reversible error occurs in single representation of co-defendants," the majority mistakenly rely upon Trotter and Harris v. State, 237 Ark. 820, 377 S.W. 2d 14 (1964); United States v. Williams, 429 F. 2d 158 (8th Cir. 1970); United States v. Gallagher, 437 F. 2d 1191 (7th Cir. 1971); United States ex rel Robinson v. Housewright, 525 F. 2d 988 (7th Cir. 1975); State v. Jeffrey, _____ Mont. _____, 515 P. 2d 364 (1973); and United States v. Jeffers, 520 F. 2d 1256 (7th Cir. 1975).

In Trotter and Harris v. State, supra, the issue was not raised in the trial court. The opinion points out that during an in camera hearing in the trial court to determine if Trotter and Harris should take the witness stand that both parties expressed their approval of appointed counsel and of his efforts during the trial. In the absence of any showing of a conflict in the record, this court properly held that there was no merit to the conflict of interest contention. In the case before us the objection was raised in the trial court and at every opportunity in keeping with the Code of Professional Conduct.

In United States v. Williams, supra, upon which the majority relies, the defendants were making a post-conviction attack upon their guilty pleas. The record there shows that both defendants had escaped from the Iowa prison at the same time and that they were arrested together. When they were brought before Judge Duncan for arraignment the appointed counsel raised the possibility of a conflict of interest. In doing so appointed counsel stated: "At this time, Your Honor, I know of no conflict but I am saying that the conflict may arise in the future." When Judge Duncan asked, "Is there anything, any statement that come from [the defendants] that indicates a conflict of interest?" The attorney responded, "Not at the present time." Thus the Eighth Circuit was correct in asserting that the post-conviction conflict of interest assertion was without merit. However, such holding is not authority for saying that a conflict arising from a confidential communication to appointed counsel should be denied when the matter is brought to the attention of the court before trial. In fact the very emphasis of the court to the proposition that the motion was not made upon a confidential communication would indicate that the court would require representation by different counsel should that situation arise.

In United States v. Gallagher, supra, the court had appointed separate counsel for each defendant. Subsequently, the defendants employed single counsel to represent both. When the evidence showed that one of the defendants was the dominant member of the conspiracy, the lawyer suggested to the court that he didn't know, "whether I should let Tom Gallagher go at this time and concentrate on the lack of evidence against Neil Gallagher or whether I should concentrate on the [evidence] against Neil and pound that in front of the jury." The court there pointed out that the existence of a conflict of interest was left to only speculation and surmise. There was no contention in that case that the conflict arose from a confidential communication. In fact, it would appear that the motion was more in the nature of a defense ploy.

The majority's reliance upon United States ex rel Robinson v. Housewright, supra, is totally misplaced. There Robinson had entered a bargained plea of guilty to murder and received a reduced sentence. He sought to raise the conflict of interest of his appointed counsel in a post-conviction hearing. However, the appointed counsel testified that he knew of no conflict of interest. In pointing out that Robinson was entitled to no relief the court stated:

> "...The record discloses that the court appointed attorney had not ascertained the presence of a disabling conflict. Nor does anything suggest that he would not have brought to the attention of the court the existence of such a conflict..." [citing §3.5(a) ABA Standards for Criminal Justice, supra,]

The majority's reliance upon State v. Jeffry, supra, is not supported by the facts there involved nor the reasoning of the Montana Court. Both defendants there were tried together and as pointed out by the court:

> "Both hired and retained the same counsel to represent them in all preliminary matters and at trial. Counsel was not appointed, or imposed upon either of them--he was retained by the defendants. Prior to this appeal neither of the defendants had claimed he was denied effective counsel, but now, after conviction, they each contend that since they were represented by the same counsel they each were denied their right to effective counsel."

The Montana Court first stated that in determining the conflict of interest issue, it followed the reasoning set forth in Kruchten v. Eyesman, 406 F. 2d 311 (9th Cir. 1969), which provides:

> "In considering the legal aspect of the conflict of interest claim, we start with the premise that if a conflict of interest actually exists the court will not weigh or determine the degree of prejudice which may result before granting relief. Glasser v. United States, 315 U.S. 60, 62, S. Ct. 457, 86 L. Ed. 680 (1942). However, until an actual conflict is shown to exist or can be reasonably foreseen an attorney may, in good faith, represent both defendants."

The reason for denying relief when the conflict issue is raised for the first time on appeal was stated by the Montana Court as follows:

> "...The whole problem directs itself ultimately on appeal to the adequacy or inadequacy of defense counsel and in the eyes of this court such adequacy or inadequacy of counsel should not be tested by the greater sophistication of appellate counsel who did not try the case, nor should the test by made on the basis of applying different defense tactics, perhaps of doubtful efficiency, after leisurely studying the transcript of the trial..."

Of course in the case before us we have the statement of the Public Defender that a conflict would arise in the event the defendants took the witness stand in their own behalf. He made that statement because of confidential communications he had received from his clients.

Finally the majority make much of the fact that the now Justice John Paul Stevens wrote the opinion in United States v. Jeffers, 520 F. 2d 1256 (1976). That case does not even involve a conflict of interest arising from the representation of co-defendants. There retained counsel, Cohen of the law firm of Cohen & Thiros, represented a

number of defendants termed "The Family" who were indicted for a "highly-structured and on-going narcotics distribution net work in Gary, Indiana." On the sixth day of trial the government brought forth as a witness one James Berry. At that time Cohen informed the court that Berry had previously been represented by one of his law partners in a prior state court homicide case. Cohen admitted that his law firm did not then represent Berry, that he did not personally know Berry, and that he personally had had no confidential communication from Berry. Before concluding that no conflict of interest was shown that would effectively prevent the cross-examination of witness Berry, Judge Stevens emphasized:

> "...We also emphasize at the outset that this is not a case involving an existing personal relationship between Cohen and the witness Berry. Consequently, the numerous cases involving an ongoing relationship between an adverse witness and a lawyer are inappropriate."

In a foot note following the above statement it is stated:

> "The courts have frequently held that the existence of such a relationship, with the inherent hesitancy of counsel to completely cross-examine a current client, creates a very real conflict of interest and requires a mistrial if the conflict is disclosed, or a new trial, if the conflict is discovered only later, see Castillo v. Estelle, 504 F. 2d 1243 (5th Cir. 1974),..."

Our own case of Shelton v. State, 254 Ark. 815, 496 S.W. 2d 419 (1973), falls in the category of the cases mentioned by Justice Stevens in the foot note, supra.

The majority's assertion that the Public Defender should tell all of his confidential communications to the trial judge to protect some of his clients could prove very embarrassing to the public defender's other clients if the jury should become hung on the amount of the punishment and leave the punishment to be fixed by the trial court. Under the majority opinion appointed counsel can never maintain inviolate the confidence of his clients.

For the reasons stated I respectfully dissent.

George Rose Smith and Fogleman,JJ., join in this dissent.

APPENDIX "B"

IN THE SUPREME COURT OF ARKANSAS

WINSTON M. HOLLOWAY,
RAY LEE WELCH, and
GARY DON CAMPBELL — APPELLANTS

VS. CRIMINAL NO. CR-76-25

STATE OF ARKANSAS — APPELLEE

PETITION FOR REHEARING

Come now the Appellants, Winston M. Holloway, Ray Lee Welch and Gary Don Campbell, and respectfully petition this Court to grant a rehearing of their appeal and to thereafter reverse the judgment of the lower Court and for grounds for their petition would respectfully assert the following errors contained in the opinion of this Court delivered on July 19, 1976:

I.

The majority opinion erred in stating that the record did not reflect that the jurors ever saw the appellants in their jail uniforms. The Prosecuting Attorney told the Court that this could be cured by telling the jury that they were in custody of the county and that these were not prison clothes (T. 119-120). The majority opinion of this Court further erred by holding that if they wanted to waste time by letting them go get dressed they could, but this was after they had been paraded through the courtroom. It was further error to hold that county jail clothes were not prison garb. Miller v. State, 249 Ark. 3, 457 S.W. 2d 848 (1970); Estelle v. Williams, 19 Cr. L. 3061, U.S. Supreme Court, May 5, 1976; Gaito v. Brierly, 485 F. 2d 63 (CA3 1973); Brooks v. Texas, 381 F. 2d 619 (1967).

II.

The majority opinion erred in holding that a severance should not have been granted to each appellant since counsel for appellants did not inform the trial judge of the nature of the confidential information he had in order for the trial judge to rule on the Motion to Sever. To reveal confidential information received from an attorney's client to the trial court would necessitate a record being made for this Court to determine if the trial judge abused his discretion in making a ruling on a Motion for separate counsel. The majority opinion of this Court destroys any confidence a client may have to his attorney not to violate a privileged communication. The petitioners hereby adopt the dissenting opinion of this Court in their Petition due to the limited amount of space allotted to them in this Petition.

WHEREFORE, Appellants pray that said appeal be reheard by this Court, that upon such rehearing that the judgment of the Pulaski County Circuit Court be reversed and the case remanded.

Respectfully submitted,

Harold L. Hall
HAROLD L. HALL
PUBLIC DEFENDER
Sixth Judicial District

CERTIFICATE

Comes Harold L. Hall, Attorney for Appellants, Winston M. Holloway, Ray Lee Welch, and Gary Don Campbell, and states that the above and foregoing Petition for Rehearing is not filed for the purpose of delay and it is his belief that there is merit in the Petition.

Harold L. Hall
HAROLD L. HALL

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above and foregoing Petition for Rehearing on the Hon. Jim Guy Tucker, Attorney General, State of Arkansas, at his office in the Justice Building, Little Rock, Arkansas, this 3rd day of August, 1976.

Harold L. Hall
HAROLD L. HALL

APPENDIX "C"

STATE OF ARKANSAS)
) SCT.
In the Supreme Court)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 4th day, being the first Monday of October, A.D. 1975, amongst others were the following proceedings, to-wit:

On the 20th day of September, A.D. 1976, a day of said term

Winston M. Holloway, Ray Lee Welch and Gary Don Campbell Appellants No. CR 76-25 State of Arkansas Appellee	Appeal from Pulaski Circuit Court First Division Circuit

Petition for rehearing denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 9th day of December, A.D. 1976.

JIMMY H. HAWKINS
Clerk

By Robin Henderson
D.C.

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5856

WINSTON M. HOLLOWAY, ET AL.
Petitioners,

—*v.*—

STATE OF ARKANSAS,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

PETITION FOR CERTIORARI FILED DECEMBER 13, 1976
CERTIORARI GRANTED APRIL 18, 1977

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5856

WINSTON M. HOLLOWAY, ET AL.

Petitioners,

—*v.*—

STATE OF ARKANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

INDEX

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 29, 1975 Felony Information filed charging Winston Holloway, Ray Lee Welch and Gary Don Campbell with Robbery (R. 1-2).

July 29, 1975 Felony Information filed charging Winston Holloway, Ray Lee Welch and Gary Don Campbell with Rape First Degree (R. 6-7).

July 29, 1975 Felony Information filed charging Winston Holloway, Ray Lee Welch and Gary Don Campbell with Rape First Degree (R. 11-12).

Aug. 5, 1975 The defendants appeared in court with their court-appointed attorney, the Public Defender, and entered pleas of not guilty (R. 17).

Aug. 7, 1975 The cases were set for a jury trial on September 4 and 5, 1975 (R. 22).

Aug. 8, 1975 A Motion for Severance was filed on behalf of each defendant (R. 23-29).

Aug. 13, 1975 A Motion for appointment of separate counsel due to a possibility of a conflict of interest was filed (R. 31).

Aug. 19, 1975 After a hearing the Court denied the defendants Motion for Severance and Motion for separate counsel (R. 32).

Sept. 5, 1975 The jury returned a verdict of guilty on each count and sentenced each defendant to a life sentence on each count of Rape in the First Degree and to twenty-one years on the Robbery (R. 38-39).

Sept. 5, 1975 Judgment was entered against Winston M. Holloway and his punishment was fixed at two Life sentences and one 21 year sentence (R. 40-42).

Sept. 5, 1975 Judgment was entered against Ray Lee Welch and his punishment was fixed at two Life sentences and one 21 year sentence (R. 43-45).

Sept. 5, 1975 Judgment was entered against Gary Don Campbell and his punishment was fixed at two Life sentences and one 21 year sentence (R. 46-47).

Sept. 8, 1975 Notice of Appeal to the Supreme Court of Arkansas was filed on behalf of each defendant (R. 69).

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

No. CR75-1090

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, RAY LEE WELCH,
GARY DON CAMPBELL, DEFENDANTS

FELONY INFORMATION

Filed July 29, 1975

[R. 1] Lee A. Munson, Prosecuting Attorney of the Sixth Judicial District of Arkansas, in the name, by the authority, and on behalf of the State of Arkansas Charges WINSTON M. HOLLOWAY, RAY LEE WELCH AND GARY DON CAMPBELL with the crime of violating Ark. Stat. Ann. § 41-3601, ROBBERY, committed as follows, to-wit: the said defendant(s), in Pulaski County, Arkansas, on or about the 1st day of June, 1975, did unlawfully, feloniously, wilfully, maliciously and violently from the person of David Carroll, agent of the Leather Bottle, and against his will, by putting him, David Carroll, in fear, take, steal and carry away money and property, said money and property being then and there the property of him, David Carroll, agent of the Leather Bottle, against the peace and dignity of the State of Arkansas.

WINSTON M. HOLLOWAY, RAY LEE WELCH AND GARY DON CAMPBELL committed the above felony using a firearm, and consequently their sentences should be enhanced as provided for in Ark. Stat. Ann. § 43-2336 to § 43-2338.

WINSTON M. HOLLOWAY has previously been convicted of at least three felonies and GARY DON CAMPBELL has previously been convicted of at least one

felony; consequently their sentences should be increased as provided for in Ark. Stat. Ann. § 43-2328, against the peace and dignity of the State of Arkansas.

(certificate omitted in printing)

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

No. CR75-1092

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, RAY LEE WELCH,
GARY DON CAMPBELL, DEFENDANTS

FELONY INFORMATION

Filed July 29, 1975

[R. 6] Lee A. Munson, Prosecuting Attorney of the Sixth Judicial District of Arkansas, in the name, by the authority, and on behalf of the State of Arkansas Charges WINSTON M. HOLLOWAY, RAY LEE WELCH AND GARY DON CAMPBELL, with the crime of violating Ark. Stat. Ann. § 41-4301, RAPE FIRST DEGREE committed as follows, to-wit: The said defendant(s), in Pulaski County, Arkansas, on or about the 1st day of June, 1975, did unlawfully, feloniously, engaged in sexual intercourse with a female, Robin Rice, by forcible compulsion, against the peace and dignity of the State of Arkansas.

WINSTON M. HOLOWAY, RAY LEE WELCH AND GARY DON CAMPBELL committed the above felony using a firearm, and consequently their sentences should be enhanced as provided for in Ark. Stat. Ann. § 43-2336 to § 43-2338.

WINSTON M. HOLLOWAY has previously been convicted of at least three felonies and GARY DON CAMPBELL has previously been convicted of at least one felony; consequently their sentences should be increased as provided for in Ark. Stat. Ann. § 43-2328, against the peace and dignity of the State of Arkansas.

(certificate omitted in printing)

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

No. CR75-1094

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, RAY LEE WELCH,
GARY DON CAMPBELL, DEFENDANTS

FELONY INFORMATION

Filed July 29, 1975

[R. 11] Lee A. Munson, Prosecuting Attorney of the Sixth Judicial District of Arkansas, in the name, by the authority, and on behalf of the State of Arkansas, Charges WINSTON M. HOLLOWAY, RAY LEE WELCH and GARY DON CAMPBELL with the crime of violating Ark. Stat. Ann. § 41-4301, RAPE FIRST DEGREE, committed as follows, to-wit: The said defendants, in Pulaski County, Arkansas, on or about the 1st day of June, 1975, did unlawfully, feloniously, engage in sexual intercourse with a female, Mary McKinney, by forcible compulsion, against the peace and dignity of the State of Arkansas.

WINSTON M. HOLLOWAY, RAY LEE WELCH and GARY DON CAMPBELL committed the above felony using a firearm, and consequently their sentences should be enhanced as provided for in Ark. Stat. Ann. § 43-2336 and § 43-2328.

WINSTON M. HOLLOWAY has previously been convicted of at least three felonies and GARY DON CAMPBELL has previously been convicted of at least one felony; consequently their sentences should be increased as provided for in Ark. Stat. Ann. § 43-2328, against the peace and dignity of the State of Arkansas.

(certificate omitted in printing)

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

No. CR75-1090, 2, 4

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, RAY LEE WELCH,
GARY DON CAMPBELL, DEFENDANTS

DEFENDANT WINSTON M. HOLLOWAY'S MOTION FOR SEVERANCE

Filed August 8, 1975

[R. 24] Comes your Petitioner, Winston M. Holloway, and files this, his Motion for Severance of defendants, and files this his Motion for a separate trial of defendant, Winston M. Holloway, and as a basis for the relief herein requested, states:

1. That due to the nature of the offense witnesses may be called to testify against other defendants of which said testimony would have no connection or bearing on petitioner's case but implications could prove harmful to said petitioner.
2. That a joint trial would deprive him of his right to call his co-defendants as witnesses.
3. Should any of the co-defendants fail to testify and if the attorney's duty to one of the other co-defendants should require him to draw the jury's attention to the possible inference of guilty from such silence, then this defendant would suffer irreparable injury because of such joinder.

(certificate omitted in printing)

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

No. CR75-1090, 2, 4

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, RAY LEE WELCH,
GARY DON CAMPBELL, DEFENDANTS

DEFENDANT RAY LEE WELCH'S MOTION FOR SEVERANCE

Filed August 8, 1975

[R. 26] Comes your Petitioner, Ray Lee Welch, and files this, his Motion for Severance of defendants, and files this his Motion for a separate trial of defendant, Ray Lee Welch, and as a basis for the relief herein requested, states:

1. That due to the nature of the offense witnesses may be called to testify against other defendants of which said testimony would have no connection or bearing on petitioner's case but implications could prove harmful to said petitioner.
2. That a joint trial would deprive him of his right to call his co-defendants as witnesses.
3. Should any of the co-defendants fail to testify and if the attorney's duty to one of the other co-defendants should require him to draw the jury's attention to the possible inference of guilty from silence, then this defendant would suffer irreparable injury because of such joinder.

WHEREFORE, premises considered, your petitioner prays that this Court grant him a severance under Ark. Stat. Ann. § 43-1802 and that he be granted a separate trial.

(certificate omitted in printing)

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

No. CR75-1090, 2, 4

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, RAY LEE WELCH,
GARY DON CAMPBELL, DEFENDANTS

DEFENDANT GARY DON CAMPBELL'S MOTION FOR SEVERANCE

Filed August 8, 1975

[R. 28] Comes your Petitioner, Gary Don Campbell, and files this, his Motion for Severance of defendants, and files this, his Motion for a separate trial of defendant, Gary Don Campbell, and as a basis for the relief herein requested, states:

1. That due to the nature of the offense witnesses may be called to testify against other defendants of which said testimony would have no connection or bearing on petitioner's case but implications could prove harmful to said petitioner.
2. That a joint trial would deprive him of his right to call his co-defendants as witnesses.
3. Should any of the co-defendants fail to testify and if the attorney's duty to one of the other co-defendants should require him to draw the jury's attention to the possible inference of guilty from such silence, then this defendant would suffer irreparable injury because of such joinder.

WHEREFORE, premises considered, your petitioner prays that this Court grant him a severance under Ark. Stat. Ann. § 43-1802 and that he be granted a separate trial.

(certificate omitted in printing)

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IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

No. CR75-1090, 2, 4

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, RAY LEE WELCH,
GARY DON CAMPBELL, DEFENDANTS

DEFENDANTS' MOTION FOR SEPARATE COUNSEL

Filed August 13, 1975

[R. 31] Comes Harold L. Hall, Public Defender, Sixth Judicial District, and states to the Court that he was appointed to represent the above named defendants on August 5, 1975, in a case which has been set for a Jury Trial on September 4 and 5, 1975. That the defendants have stated to him that there is a possibility of a conflict of interest in each of their cases and have asked him to request the Court to appoint separate counsel for each defendant.

WHEREFORE, defendants pray that separate counsel be appointed for each of them due to the possibility of a conflict of interest in each of their cases.

* * * *

11

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

No. CR75-1090, 2, 4

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, RAY LEE WELCH,
GARY DON CAMPBELL, DEFENDANTS

ORDER DENYING DEFENDANTS' MOTION FOR SEVERANCE AND SEPARATE COUNSEL

Filed August 19, 1975

[R. 32] This day comes the State of Arkansas by Lee Munson, Prosecuting Attorney, and come the defendants in proper person and by their attorney, Harold L. Hall, Public Defender, and a hearing is had on defendants' Motion for Severance and Motion for Separate Counsel, and said motions are hereby denied.

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

CR-75-1090

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, DEFENDANT

ROBBERY

JUDGMENT (WINSTON M. HOLLOWAY)

Filed September 5, 1975

[R. 40] This day comes the State of Arkansas by Lee A. Munson, Prosecuting Attorney, and comes the defendant in proper person in custody of the Sheriff and by his Attorney, Harold L. Hall, Public Defender, appointed by the Court, and the Jury having returned a verdict of Guilty with punishment fixed at Twenty-one (21) years imprisonment in the State Penitentiary, the Court doth this date sentence and commit defendant to Twenty-one (21) years imprisonment in the State Penitentiary as recommended by the Jury.

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

CR75-1092

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, DEFENDANT

RAPE IN THE FIRST DEGREE

JUDGMENT (WINSTON M. HOLLOWAY)

Filed September 5, 1975

[R. 41] This day comes the State of Arkansas by Lee A. Munson, Prosecuting Attorney, and comes the defendant in proper person in custody of the Sheriff and by his Attorney, Harold L. Hall, Public Defender, appointed by the Court, and the Jury having returned a verdict of Guilty with punishment fixed at Life imprisonment in the State Penitentiary, the Court doth this date sentence and commit defendant to Life imprisonment in the State Penitentiary as recommended by the Jury.

* * * *

14

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

CR75-1094

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, DEFENDANT

RAPE IN THE FIRST DEGREE

JUDGMENT (WINSTON M. HOLLOWAY)

Filed September 5, 1975

[R. 42] This day comes the State of Arkansas by Lee A. Munson, Prosecuting Attorney, and comes the defendant in proper person in custody of the Sheriff and by his Attorney, Harold L. Hall, Public Defender, appointed by the Court, and the Jury having returned a verdict of Guilty with punishment fixed at Life imprisonment in the State Penitentiary, the Court doth this date sentence and commit defendant to Life imprisonment in the State Penitentiary as recommended by the Jury.

* * * *

15

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

CR75-1090

STATE OF ARKANSAS, PLAINTIFF

vs.

RAY LEE WELCH, DEFENDANT

ROBBERY

JUDGMENT (RAY LEE WELCH)

Filed September 5, 1975

[R. 43] This day comes the State of Arkansas by Lee A. Munson, Prosecuting Attorney, and comes the defendant in proper person in custody of the Sheriff and by his Attorney, Harold L. Hall, Public Defender, appointed by the Court, and the Jury having returned a verdict of Guilty with punishment fixed at Twenty-one (21) years imprisonment in the State Penitentiary, the Court doth this date sentence and commit defendant to Twenty-one (21) years imprisonment in the State Penitentiary, as recommended by the Jury.

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

CR75-1092

STATE OF ARKANSAS, PLAINTIFF

vs.

RAY LEE WELCH, DEFENDANT

RAPE IN THE FIRST DEGREE

JUDGMENT (RAY LEE WELCH)

Filed September 5, 1975

[R. 44] This day comes the State of Arkansas by Lee A. Munson, Prosecuting Attorney, and comes the Defendant in proper person in custody of the Sheriff and by his Attorney, Harold L. Hall, Public Defender, appointed by the Court, and the Jury having returned a verdict of Guilty with punishment fixed at Life imprisonment in the State Penitentiary, the Court doth this date sentence and commit defendant to Life imprisonment in the State Penitentiary as recommended by the Jury.

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

CR75-1094

STATE OF ARKANSAS, PLAINTIFF

vs.

RAY LEE WELCH, DEFENDANT

RAPE IN THE FIRST DEGREE

JUDGMENT (RAY LEE WELCH)

Filed September 5, 1975

[R. 45] This day comes the State of Arkansas by Lee A. Munson, Prosecuting Attorney, and comes the defendant in proper person in custody of the Sheriff and by his Attorney, Harold L. Hall, Public Defender, appointed by the Court, and the Jury having returned a verdict of Guilty with punishment fixed at Life imprisonment in the State Penitentiary, the Court doth this date sentence and commit defendant to Life imprisonment in the State Penitentiary as recommended by the Jury.

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

CR75-1094

STATE OF ARKANSAS, PLAINTIFF

vs.

GARY DON CAMPBELL, DEFENDANT

RAPE IN THE FIRST DEGREE

JUDGMENT (GARY DON CAMPBELL)

Filed September 5, 1975

[R. 46] This day comes the State of Arkansas by Lee A. Munson, Prosecuting Attorney, and comes the defendant in proper person in custody of the Sheriff and by his Attorney, Harold L. Hall, Public Defender, appointed by the Court, and the Jury having returned a verdict of Guilty with punishment fixed at Life imprisonment in the State Penitentiary, the Court doth this date sentence and commit defendant to Life imprisonment in the State Penitentiary as recommended by the Jury.

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

CR75-1090

STATE OF ARKANSAS, PLAINTIFF

vs.

GARY DON CAMPBELL, DEFENDANT

ROBBERY

JUDGMENT (GARY DON CAMPBELL)

Filed September 5, 1975

[R. 47] This day comes the State of Arkansas by Lee A. Munson, Prosecuting Attorney, and comes the defendant in proper person and by his Attorney, Harold L. Hall, Public Defender, appointed by the Court, and the Jury having returned a verdict of Guilty with punishment fixed at Twenty-one (21) years imprisonment in the State Penitentiary, the Court doth this date sentence and commit defendant to Twenty-one (21) years imprisonment in the State Penitentiary as recommended by the Jury.

* * * *

IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

CR75-1092

STATE OF ARKANSAS, PLAINTIFF

vs.

GARY DON CAMPBELL, DEFENDANT

RAPE FIRST DEGREE

JUDGMENT (GARY DON CAMPBELL)

Filed September 5, 1975

[R. 48] This day comes the State of Arkansas by Lee A. Munson, Prosecuting Attorney, and comes the Defendant in proper person in custody of the Sheriff and by his Attorney, Harold L. Hall, Public Defender, appointed by the Court, and the Jury having returned a verdict of Guilty with punishment fixed at Life imprisonment in the State Penitentiary, the Court doth this date sentence and commit defendant to Life imprisonment in the State Penitentiary as recommended by the Jury.

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IN THE PULASKI CIRCUIT COURT
FIRST DIVISION

No. CR75-1090, 2, 4

STATE OF ARKANSAS, PLAINTIFF

vs.

WINSTON M. HOLLOWAY, RAY LEE WELCH,
GARY DON CAMPBELL, DEFENDANTS

NOTICE OF APPEAL

Filed September 8, 1975

[R. 69] Come the defendants, Winston M. Holloway, Ray Lee Welch, and Gary Don Campbell, and pray an appeal to the Supreme Court of Arkansas from the judgment and sentence of this Court rendered on September 5, 1975, and designate the entire record as their record of appeal in this case.

(certificate omitted in printing)

TRANSCRIPT OF PROCEEDINGS
EXCERPTS FROM ORAL MOTION

[121] Mr. Hall: I have one other motion. Previously, I had filed a Motion and asked the Court to appoint separate attorneys for each defendant. The Court: Yes, Sir, and I refused to do it.

Mr. Hall: At this time I would like to renew that Motion on the grounds that one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them. The Court: I don't know why you wouldn't. Overruled. Save your exceptions.

* * * *

[237] Mr. Hall: If the Court please, I talked to my clients, the three defendants, this morning. I have received information from all three of them that they wish to testify. The Court: And you have advised them of their rights that they don't have to testify.

Mr. Hall: I have advised them of their rights, that they have a right to testify or not to testify in their own behalf. Now, since I have been appointed, I had previously filed a motion asking the Court to appoint a separate attorney for [238] each defendant because of a possible conflict of interest. This conflict will probably be now coming up since each one of them wants to testify. The Court: That's all right; let them testify. There is no conflict of interest. Every time I try more than one person in this Court each one blames it on the other one.

Mr. Hall: I have talked to each one of these defendants, and I have talked to them individually, not collectively. The Court: Now talk to them collectively. Do you all want to testify? Defendant Welch: Yes, we do, I do.

The Court: All of you want to testify? (All defendants nodded in the affirmative).

The Court: You don't want to waive the privilege of not testifying? (All defendants responded in the negative).

[239] The Court: You know what you are doing? (All defendants nodded in the affirmative).

The Court: He's advised you that you have a right to testify or not to testify if you desire? (All defendants nodded in the affirmative).

Mr. Hall: I am in a position now where I am more or less muzzled as to any cross-examination. The Court: You have no right to cross-examine your own witness.

Mr. Hall: Or to examine them. The Court: You have a right to examine them, but you have no right to cross-examine them. The prosecuting attorney does that.

Mr. Hall: If one takes the stand, somebody needs to protect the other two's interest while that one is testifying, and I can't do that since I have talked to each one individually. [240] The Court: Well, you have talked to them, I assume, individually and collectively, too. They all say they want to testify. I think it's perfectly alright for them to testify if they want to, or not. It's their business.

Mr. Hall: Save my exceptions. The Court: You are overruled.

Mr. Hall: On a specific objection, which I have just enumerated. The Court: You are overruled. Each defendant said he wants to testify, and there will be no cross-examination of these witnesses, just a direct examination by you.

Mr. Hall: Your Honor, I can't even put them on direct examination because if I ask them—The Court: (Interposing) You can just put them on the stand and tell the Court that [241] you have advised them of their rights and they want to testify; then you tell the man to go ahead and relate what he wants to. That's all you need to do.

Mr. Hall: And instead of making any objections again out in the courtroom, I am making it right now, and this will be a continuing objection through each one of their testimony. The Court: Through each one's testimony, and you can remake it and I'll overrule it again.

* * * *

[245] KENNETH HOLLOWAY, a witness called by and on behalf of the Defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Hall:

Q. State your name, please, sir. A. Kenneth Holloway.

Q. Now, speak up so we can hear you down at this end. A. Kenneth Holloway.

Q. Mr. Holloway, you are the brother of Winston Holloway? A. Yes.

Q. Directing your attention to the last day of the month of June, or May, in the early morning hours of June the 1st, 1975, where were you? A. At home.

Q. Was anyone with you at home? A. My wife, and three children.

Q. Now, had you just had surgery or anything? A. Yes, sir. Approximately four weeks before I had a hernia repair and extensive surgery in my lower abdomen.

Q. Now, in addition to your wife and children, was anyone else present with you that night? A. Later that night there was.

Q. At what time later? [246] A. It was sometime after midnight. It was sometime after midnight, I was—and it was before one o'clock because I—it was that good enough, I was going to say I was watching t.v.

Q. Who was with you at that time? A. Well, my brother—I had been expecting him earlier in the day; but, that night, it was sometime after midnight that he really got there because of his car. He had car trouble.

Q. You say it was before one o'clock? A. Yes, sir.

Q. How long did he stay with you that night? A. At least two and a half hours. It seemed like that, a couple of hours.

Q. Now, you're positive that Winston Holloway was there with you? A. That's correct.

Q. Did you stay at home? A. That's right.

Q. Did you go anywhere? A. Well, I couldn't. I had hematoma set up in my side, and [247] my brother has medical training, and he was helping me cleaning the wound out.

Q. Was your wife and children in bed at that time? A. They were. They were upstairs. I live in a townhouse, and they were upstairs in bed.

Q. You live in a townhouse? A. A townhouse apartment, yes, sir. I had my bed downstairs because I couldn't go up and down the stairs because of my surgery.

Q. And your wife and children were upstairs, and you and your brother, Winston, were downstairs from one o'clock for approximately two and a half hours? A. A couple of hours at least.

Q. And you are positive on the date? A. I am positive, yes, sir.

Mr. Munson: I have no questions.

The Court: Call your next witness, Mr. Hall.

Mr. Hall: At this time, Your Honor, as I have explained to the Court, I am the court appointed counsel for all three defendants. I have explained to the defendants their [248] right to testify or not to testify, and I have made my motions in Chambers previous to this, and each of the defendants state that they wish to testify. Now, I, being their counsel and talking with each one separately, I feel that I am more or less muzzled as to asking them questions or cross-examining—

The Court: (Interposing) Well, let's don't make a speech.

Mr. Hall: But I want my objections made in the record.

The Court: Your objections have already been made, and your exceptions have already been saved. Call your next witness.

Mr. Hall: Well, Your Honor, I can't direct examine them, but—Mr. Holloway, you want to testify first?

[249] WINSTON M. HOLLOWAY, having been called as a witness in his own behalf and after being duly sworn, was examined and testified on oath as follows:

The Court: You are fully aware that you don't have to testify if you don't want to? Defendant Holloway: Yes, sir.

The Court: You are going to take the stand? Defendant Holloway: Yes, sir.

Mr. Hall: If the Court please, I cannot ask any direct questions, it being detrimental to the other two defendants.

The Court: Go ahead and examine this witness.

Mr. Hall: May I put that in the record, over my objections?

The Court: Yes, sir.

By Mr. Hall:

[250] Q. Mr. Holloway, you have heard the testimony in this case so far? A. Yes, sir.

Q. And you have a statement to make? A. Yes, sir, I do.

Q. Would you give your statement to the jury; and, as I have said, I can't ask you too many questions. You state to the jury in your own words what you know about this case, if anything? A. I know nothing about this case. As my brother stated, I was—I came into Little Rock from Stuttgart. My car broke down on the highway, and a highway patrolman—The Court: (Interposing) Don't talk so fast. A. (Continuing) I was forced from Keo, Arkansas, to hitchhike back into Little Rock, and the purpose was to come in and help my brother. I got into Little Rock and being without an automobile —I frequently drive a cab part-time to supplement my income—I checked the cab out at the cab company and went to a motel in North Little Rock and spent some time with some people there and left about—

Q. (Interposing) Speak a little louder. A. I checked a cab out from the cab company, and I went to North Little Rock to a motel and spent some time with some

people there. I left there about twelve or twelve-thirty and went to my brother's house. And, as he stated, he had previous surgery for a hernia and had developed a hematoma, which is a blood clot, and required frequent dressing changes. He did not stay in the hospital for this. He stayed at home, and that's why I came and helped him. I had had surgical experience in the military. I stayed there until between two and three o'clock and went to another motel on East Broadway where my dispatcher was trying to find another cab driver. I told him where he was; he was in a room with a girl there. And this covers the time during this crime. I at no time was in the place that night; I did not rape anyone; and I did not put a gun on anybody.

The Court: Is that what you want to say?

Defendant Holloway: Yes, sir.

The Court: You may cross-examine him, Mr. Munson.

CROSS EXAMINATION

By Mr. Munson:

Q. You say you checked a cab out that night, Mr. Holloway? A. Yes, sir, I sure did.

Q. What time of night did you check this cab out? [252] A. I'm not really—I can't be definitely sure. I say—

Q. (Interposing) What kind of cab was it? A. A Yellow Cab.

Q. You drive for them occasionally; is that correct? A. Occasionally, yes.

Q. Where did you get your chauffeur's license? A. State of Arkansas; here in Little Rock.

Q. Did you apply at the revenue department? A. Yes, sir.

Q. Did you prepare an affidavit at the revenue department to obtain this license? A. Yes, sir.

Q. What did this affidavit ask you? A. It asked if I had any prior convictions.

Q. And did you tell them? A. Yes, sir.

Q. How many, Mr. Holloway? A. Sir:

Q. How many? A. I didn't specify.

Q. Will you tell the jury about it? A. Is this necessary?

Mr. Hall: I object.

Q. (Mr. Munson, Continuing) Go ahead, Mr. Holloway. A. Yes, sir, I have had over three prior convictions.

[253] Q. Will you tell the jury what they were? A. Burglary and jail break.

Q. Anyone hurt in the jail break? A. Supposedly.

Mr. Hall: Objection.

Q. (Mr. Munson, Continuing) Mr. Holloway, there were five witnesses that got on the stand in this Court yesterday. Did you know any of those five? A: I have seen several of them occasionally.

Q. Where had you seen them? A. At the Leather Bottle.

Q. As a driver for a cab company, you take people out there; is that right? A. Occasionally.

Q. So, you knew about the Leather Bottle and its' lay-out, didn't you? A. I certainly did. I have ate there several times.

Q. And obviously, whoever came in and robbed that place knew the lay-out, didn't they? A. I have never been in the back of the place. Cab drivers do not normally go through the back doors.

Q. Well, can you explain to the jury—out of the three people sitting over there, everyone of them positively identified you. Now, how did they all make that mistake? A. That wasn't a mistake. I was a very deliberate lie.

[254] RAY LEE WELCH, having been called as a witness in his own behalf and after being duly sworn, was examined and testified on oath as follows:

The Court: You know you don't have to testify if you don't want to; you understand that, and you are waiving that privilege and going to testify? Defendant Welch: Yes, sir.

The Court: Against your counsel's advice? Defendant Welch: Yes, sir.

The Court: Proceed.

DIRECT EXAMINATION

[255] By Mr. Hall:

Q. Mr. Welch, you stated to me that you wish to testify? A. That's right.

Q. You understand that I represent the two co-defendants? A. Yes.

Q. That are charged with you? A. Yes.

Q. I cannot ask you any questions that might tend to incriminate any one of the three of you, but you wished to testify and I have advised you of your rights? A. Yes.

Q. Now, the only thing I can say is tell these ladies and gentlemen of the jury what you know about this case, if anything, and speak up so we can hear way out here. A. The only thing I know about the case is what the police told me, what I have been charged with. I don't have any kind of speech ready for the jury or anything. I thought I was going to be questioned.

Q. You don't know anything about what went on out there that night? A. No, I don't.

Q. Were you there? A. No, I wasn't there.

Defendant Holloway: Your Honor, are we allowed to make an objection?

[256] The Court: No, sir. Your counsel will take care of any objections.

Mr. Hall: Your Honor, that is what I am trying to say. I can't cross-examine them.

The Court: You proceed like I tell you to, Mr. Hall. You have no right to cross-examine your own witnesses anyhow.

Q. (Mr. Hall, Continuing) You were not present on the night or on the morning of June the 1st? A. That's right.

Q. Do you know anything of what went on out there that night of your own knowledge? A. No, not of my own knowledge; only what the police told me.

Mr. Hall: That's all.

CROSS EXAMINATION

By Mr. Munson:

Q. Well, if you don't know anything about it, Mr. Welch, will you tell the jury where you were that night? A. Yes. I was at my room.

Q. Where? A. I was at home.

[257] Q. By yourself? A. No. My brother was with me.

Q. Gary Don Campbell? A. Yes.

Q. Well, would you explain to the jury why two people, Robin Henry and Don Henry, positively identified you as being one of the robbers that night? Had you ever seen them before? A. No, I haven't.

Q. Would they have any reason to come into this court and lie about you? A. I can't think of any, but they did make mistakes. They made a mistake on the other line-up.

Q. What line-up? A. The one where they identified another man.

Q. But you have no explanation why these two people would come into this Courtroom and positively identify you as one of the assailants? A. No, I don't. I don't have any idea unless the police told them to say that. They have been schooled.

GARY DON CAMPBELL, having been called as a witness in his own behalf and after being duly sworn, was examined and testified on oath as follows:

The Court: You know you don't have to testify unless you want to? Defendant Campbell: Yes, sir.

The Court: You want to testify, over your attorney's objection? Defendant Campbell: Yes, sir.

The Court: Proceed.

Defendant Campbell: Ladies and gentlemen, I just want to make this brief.

The Court: Wait a minute. Speak a little slower so the jury can understand what you're saying.

DIRECT EXAMINATION

[259] By Mr. Hall:

Q. Gary, speak up so this gentleman can hear and this gentleman up here can hear you. Your name is Gary Don Campbell? A. Yes, sir.

Q. And you are the defendant in the case that's charged here? A. Yes, sir.

Q. Now, Mr. Campbell, on the night or the early morning of June the 1st, were you in the Leather Bottle? A. No, sir.

Q. You have heard these witnesses, two of them, identify you? A. Yes, sir.

Q. Were you there in the Leather Bottle that morning, June the 1st? A. No, sir. I have never been to that place.

Q. Never been to the Leather Bottle? A. Never have.

Q. You have heard to two officers get up here and testify that you made a statement to them admitting you were there that morning along with the other two defendants? A. Yes, sir, I heard them say that.

Q. Did you make that statement? A. No, sir, I didn't.

[260] Q. Did you sign the rights form that they gave you? A. I didn't sign anything.

Q. What were you in jail for at the time? A. I was in there for drunk, and I was under the influence of narcotics at the time.

Q. Had you taken drugs that day? A. Yes, sir.

Q. And you heard the officer testify that you registered point sixteen on the breathalyzer? A. Yes, sir.

Q. How long had you been in jail when they brought you upstairs to question you? A. I had just got there. I would say I had been there about thirty minutes.

Q. Now, you deny making the statement that they said you did? A. Yes, sir.

Q. Did you make an oral statement to them? A. No, sir.

Q. Now, Ray Welch is your half-brother; is that right? A. Yes, sir.

Q. Did you know Winston Holloway at that time? A. I didn't even know the man. I had seen him.

Q. Did you know his name? A. I didn't know his name.

[261] Q. If you didn't know his name, you couldn't put his name on this oral statement; is that right? A. I could not put his name because I didn't know it.

CROSS EXAMINATION

By Mr. Munson.

Q. What were you in jail for, Mr. Campbell, when the officers came down and advised you of your rights? A. I was in there for being drunk, public drunk.

Q. And what name were you using at that time? A. Robert Hill.

Q. Why? A. Just an alias.

Q. Why do you use aliases, Mr. Campbell? A. I don't know.

Q. Sir? A. I don't know. I just go by an alias sometime. I like the name "Robert Hill" better than my own name.

Q. How long have you had this new haircut? A. I got it over at the county jail because my hair was real long and I didn't have any shampoo and my dandruff was getting bad, and it was hot over there, and I didn't have no way to take care of it so I cut it.

Q. You didn't do that to confuse the witnesses, did you? A. No, sir.

[262] Q. Do you know David Carroll and Mary McKimmey? A. No, sir.

Q. The two people that testified yesterday, the blonde girl with the glasses and the tall man with black hair? A. No.

Q. You don't know them? A. No, sir.

Q. Never seen them before? A. Never seen them before.

Q. Why would they come in this Courtroom and positively identify you? A. They are mistaken.

Q. They are mistaken in their identity? A. Yes, sir.

Q. Is it not true, Mr. Campbell, that you are guilty of burglary for which you spent five years in the Arkansas State Penitentiary? A. No, sir. I'm not guilty for burglary which I spent five years; I'm guilty for burglary which I spent three months.

Q. On March 26, 1974? Somewhere around there.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 76-5856

WINSTON M. HOLLOWAY, ET AL., PETITIONERS

v.

ARKANSAS

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Arkansas.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to question 1 presented by the petition.

April 18, 1977

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 236428 15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976
NO. 76-5856

WINSTON M. HOLLOWAY,
RAY LEE WELCH, AND
GARY DON CAMPBELL — PETITIONERS

VS.

STATE OF ARKANSAS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

BILL CLINTON
ATTORNEY GENERAL

ARTHUR JOHN ANDERSON, JR.
DEPUTY ATTORNEY GENERAL

BY: GARY ISBELL
ASSISTANT ATTORNEY GENERAL
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

ATTORNEYS FOR RESPONDENT

INDEX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976
NO. 76-5856

WINSTON M. HOLLOWAY,
RAY LEE WELCH, AND
GARY DON CAMPBELL — PETITIONERS

VS.

STATE OF ARKANSAS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at Holloway v. State, 260 Ark. ___, ___ S.W.2d ___ (July 10, 1976).

JURISDICTION

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. §1257(3).

CITATIONS

QUESTIONS PRESENTED

1. Whether the three (3) defendants (petitioners) were denied effective assistance of counsel by the order of the court appointing a public defender to represent them in the same trial over their objections?
2. Whether the defendants' trial in jail clothing destroyed their presumption of innocence so as to deny them a fair trial?

ARGUMENT

The issues in this case have been narrowly drawn and the judicial review has been sufficient to not warrant further review by this Court. The issues, entitlement to severance and the wearing of jail clothes when summoned for trial, upon their face raise obvious questions of constitutional right deprivations but the overall development of these issues within the specifics of the proceedings amply demonstrate that a proper disposition was made thereon and the issues do not require additional review.

I.

Whether the three (3) defendants were denied effective asssistance of counsel by the order of the court appointing a public defender to represent them in the same trial over their objections?

The Sixth Amendment to the United States Constitution guarantees to the accused in a criminal proceeding the assistance of counsel for his defense and this Court has often held that it is a fundamental safeguard necessary to protect the accused within the panoply of rights accorded under the Constitution and the dictates of a fair and impartial tribunal. The import of that Amendment and the Court's holding, however, is not the equivalent of the petitioner's implied interpretation that each accused is entitled to separate counsel, regardless of the advantages of such a requirement. To the contrary this Court has held that the ". . .'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." Glasser v. United States, 315 U.S. 60, 70 (1942).

The issue for decision in this case, then, is whether or not there were such conflicting interests between the respective defendants that one attorney could not adequately protect their varied interests in his collective representation. Petitioners have not demonstrated or identified the alleged conflicting interests either in their present petition or before the Arkansas courts. The sole statement before this Court is as follows:

> "This [the discussion with the individual petitioners] prevented the public defender from examining them as to matters they had confided in with him when they took the witness stand where it conflicted with information he had received from the other two when they took the witness stand." (Petitioner's Petition at 3)

These vague allegations cannot supplant the requirement of "conflicting interests" that would impair their effective assistance of counsel.

At the trial of the cause all three(3) petitioners took the stand in their own behalf and the record reflects their respective testimony to be as follows:

(1) Winston Holloway alleged, in accordance with the testimony of his brother, that he was at his brother's home during the time of the robbery/rape incident caring for his brother who was recuperating from surgery; and

(2) Ray Lee Welch testified that he was at home during the entire night of the crime with his half-brother, the co-defendant Gary Don Campbell; and

(3) Gary Don Campbell testified that he had never been to the restaurant where the robbery/rape took place, that he had never made a contrary statement to the police about his complicity and that he didn't know Winston Holloway by name.

All three (3) defendants also testified that the victims lied when they made positive identifications of them as the criminal offenders responsible for the robbery and rapes that took place. In short, there was no conflict whatsoever in their testimony that demonstrated a need for separate representation. All three alleged alibis and two of them supported the alibi for each other.

Numerous courts have found this situation to be controlling because concurring and complimentary defenses deny the existence of an actual

conflict. See, People v. Cannedy, 270 Cal. App. 2d 669, 76 Cal. Rptr. 24 (1969), Meyers v. State, 248 S.C. 539, 151 S.E.2d 665 (1966), Gonzales v. United States, 314 F.2d 750 (9th Cir., 1963), People v. Dickens, 19 Ill. App. 3d 419, 311 N.E.2d 705 (1974), State v. Andrews, 106 Ariz. 372, 476 P.2d 673 (1970), People v. Spencer, 45 Mich. App. 440, 206 N.W.2d 733 (1973); Commonwealth v. Heard, (Pa. Super.,1973), 303 A.2d 831. Generally, see "Separate Counsel", 34 ALR 3d 470, §6(d).

The only development at trial which could have given rise to conflicting interests was the admission in evidence of an oral statement by petitioner Campbell wherein he stated that he and two other people went by cab to the restaurant and held it up, but that he had nothing to do with the rapes. However, the defendant Campbell denied having made any such statement, alleged that he was under the influence of drugs when the alleged statement was made, and, in every respect repudiated its making and the essentials of it. Under similar circumstances numerous jurisdictions have found no actual conflict sufficient to predicate severance or reversal. See, McHenry v. United States, 420 F.2d 927 (10th Cir.,1970), Frazier v. State, 287 So. 2d 386 (Fla. 1973).

Therefore, the petitioners are pressing in this case for the establishment of a per se violation of the Sixth Amendment every time multiple criminal defendants are appointed but one counsel to represent them. The advantages of such a requirement are obvious, but the mere identification of advantage does not give rise to a per se denial of

effective counsel or due process of law when there is joint representation of co-defendants. See, United States v. Williams, 429 F.2d 158 (8th Cir., 1970), and the cases cited therein at 160-161.

Petitioners' allegation may, too, be taken to argue for a per se rule whenever the joint representative of the co-defendants confronts the trial court with the possibility of a conflict of interest arising during the course of the trial. In this case the joint representative of the petitioners stated to the trial court in his pre-trial motion, "that the defendants have stated to him that there is a possibility of a conflict of interest in each of their cases . . . ." In keeping with the absence of a per se violation because of joint representation there is a duty upon counsel requesting severance or the appointment of multiple counsel to identify with specicity the nature of the conflict that will arise or, at least, assure the court that a conflict is imminent. The Eight Circuit Court of Appeals was faced with a similar situation where the joint representative informed the court that "possible conflicts of interest might arise in the future . . . ." Williams, supra at 160. The court there held the possibility of "in futuro" conflicts were little more than a "bald and conclusory statement" of counsel and without a per se violation doctrine such statements would not predicate a finding of error for the denial of additional counsel by the court. This holding is consistent with the analysis of (Glasser, supra, that an actual conflict must be shown to exist or that it is reasonably foreseen. In Lugo v. United States, 350 F.2d 858, 859 (9th Cir., 1965), the court stated:

> "All the cases cited to us by appellants involved obvious conflicts of interest, and while we cannot indulge in nice calculations about the amount of prejudice which results from a conflict of interest [Glasser, supra], neither can we create a conflict of interest out of mere conjecture as to what might have been shown."

Therefore, the petitioner's have not shown an actual or even prospective conflict of interest and without a per se violation arising upon the joint representation of codefendants there is no issue essential to this Court's review.

II.

WHETHER THE DEFENDANTS' TRIAL IN JAIL CLOTHING DESTROYED THEIR PRESUMPTION OF INNOCENCE SO AS TO DENY THEM A FAIR TRIAL?

As in the previous argument, considered facially, the argument of the petitioners raises a constitutional issue well within the parameters of previous decisions of this Court. Further, respondent cannot condone or in any manner vouch for the propriety of the conduct giving rise to the issue. Defendants should not be tried in the obvious attire of their incarceration regardless of the lack of its specific designation as prison attire - when three (3) defendants wear identical uniforms of blue pants and blue shirts the origin is manifest with or without numbers or the name of the institution emblazoned thereon.

However, the facial aspects of the petitioners' argument is not solely controlling nor does their argument accurately depict the total circumstances.

The petitioners have reproduced but a part of the total pretrial colloquy and the portion omitted is critical. Immediately following that reproduced exchange the trial court offered the defendants an opportunity, reasonable continuance, to change their clothes which the defendants did not take advantage of, and upon continued discussion of the clothes issue the trial court again said he had no objection to their changing clothes. Respondent would submit that it is reflected upon the basis of the record that the opportunity existed to remedy the situation, a reasonable continuance was offered for that purpose, the court offered to admonish

the jury in furtherance of the purpose, and the defendants, though present, refused every opportunity presented. It is the position of respondent, then, that the petitioners waived the error and certainly were not compelled to appear for trial in jail attire.

This Court has recently held that a defendant's constitutional rights were violated only when he was compelled to be tried while dressed in distinctive or identifiable prison attire. Estelle v. Williams, 425 U.S. ___, 48 L.Ed.2d 126, 96 S.Ct. 1691 (May 3, 1976). It is regretable that the prospective jurors saw and recognized the defendants before the trial so dressed, if they did, and the record does not so reflect, but there was no state engendered compulsion for their trial to be so held, and every reasonable provision was attempted to eliminate the problem. The petitioners' failure to take advantage of the trial court's proposals negates any compulsion and converts their trial in jail clothing into a volitional and deliberate act. Surely, the precepts of a fair trial and the holding of Estelle, supra, have not been abrogated under the circumstances. Too, the situational distinction between being compelled to go to the courthouse in jail clothes and being compelled to go to trial so dressed cannot permit the latter to be bootstrapped to the former and thereby arise to error. There is no logic to the concept because there is no trial in the former instance and the court has no control over the uncontrolled observations of the jury. It is just as if a prospective juror were to see the defendant brought into the back door of the courthouse while manacled and controlled by policemen - the viewing

is not of the state's making except by the coincidence of timing and it is not the trial.

The petitioner's argument when viewed in its totality does not warrant this Court's review.

CONCLUSION

This Court should deny the petitioner's application for a Writ of Certiorari where the specifics of the argument, the circumstances, and the law deny its efficacy as a claim of merit or demanding of this Court's review.

Respectfully submitted,

BILL CLINTON
ATTORNEY GENERAL

BY: Gary Isbell

GARY ISBELL
ASSISTANT ATTORNEY GENERAL
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

ATTORNEYS FOR RESPONDENT

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-5856

WINSTON M. HOLLOWAY, *et al.*,

Petitioners,

v.

STATE OF ARKANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR PETITIONERS

HAROLD L. HALL
Public Defender
601 W. 2nd Street
Little Rock, Arkansas 72201
(501) 374-9203

Attorney for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Supreme Court of Arkansas (Pet. App. A) is reported at 539 S.W.2d 435.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered July 19, 1976. That Court entered final judgment upon denying rehearing September 20, 1976 (Pet. App. C). The jurisdiction of the United States is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

The three defendants were each charged with one count of robbery and two counts of first degree rape. The Public Defender was appointed to represent the three defendants, and after talking to each defendant individually, filed a motion for a severance and a motion for separate counsel due to a possible conflict of interest. The trial Court overruled the motions and ordered the Public Defender to represent the three defendants in the same trial over their objections.

The question presented is whether the three defendants were denied effective assistance of counsel by the order of the trial court appointing the Public Defender to represent them in the same trial over their objections.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

CONSTITUTION OF THE UNITED STATES, SIXTH AMENDMENT:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . and to have the assistance of counsel for his defense.

CONSTITUTION OF THE UNITED STATES, FOURTEENTH AMENDMENT:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

CONSTITUTION OF ARKANSAS, ARTICLE 2, SECTION 10:

> In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed; . . . and to be heard by himself and his counsel.

STATEMENT

Following a jury trial in the Circuit Court of Pulaski County, Arkansas, the petitioners were each convicted of one count of robbery and two counts of first degree rape. Each petitioner was sentenced to twenty-one years for robbery and two life sentences for rape. In a four to three decision, the Arkansas Supreme Court affirmed their convictions and sentences. (Pet. App. A; 539 S.W.2d 435).

In the early morning hours of June 1, 1975, the Leather Bottle Restaurant in Little Rock, Arkansas, was robbed by three men. During the course of the robbery, two of the waitresses were raped.

The defendants were arrested at different times and placed in separate line-ups at different times, and identified by the five witnesses who were in the Leather Bottle. One of the waitresses was raped once and the other one was raped twice. Defendant Holloway was identified by one of the waitresses as the man who raped her, but neither could identify the other man or if it was two different men (R. 145-148 and R. 201-203).

The Public Defender was appointed to represent all three defendants over his objections due to a possible conflict of interest. Each of the defendants filed a Motion for Severance (App. 7-9) and for separate counsel (App. 10). The Court denied their Motion for Severance and separate counsel (App. 11).

At the beginning of the trial, the Public Defender made the following oral motion:

(R. 121) MR. HALL: I have one other motion. Previously, I had filed a Motion and asked the Court to appoint separate attorneys for each defendant.

THE COURT: Yes, sir, and I refused to do it.

MR. HALL: At this time I would like to renew that Motion on the grounds that one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them.

THE COURT: I don't know why you wouldn't. Overruled. Save your exceptions.

Later in the trial and just before the defendants testified, the Public Defender again requested the Court to appoint separate counsel due to a possible conflict of interest.

(R. 237) MR. HALL: If the Court please, I talked to my three clients, the three defendants, this morning. I have received information from all three of them that they wish to testify.

THE COURT: And you have advised them of their rights and that they don't have to testify.

MR. HALL: I have advised them of their rights, that they have a right to testify or not to testify in their own behalf. Now, since I have been appointed, I had previously filed a motion asking the Court to appoint a separate attorney for (R. 238) each defendant because of a possible conflict of interest. This conflict will probably be now coming up since each one of them wants to testify.

THE COURT: That's all right; let them testify. There is no conflict of interest. Every time I try more than one person in this Court each one blames it on the other one.

MR. HALL: I have talked to each one of these defendants, and I have talked to them individually, not collectively.

THE COURT: Now talk to them collectively. Do you all want to testify?

DEFENDANT WELCH: Yes, we do, I do.

THE COURT: All of you want to testify? (All defendants nodded in the affirmative.)

THE COURT: You don't want to waive the privilege of not testifying? (All defendants responded in the negative.)

(239) THE COURT: You know what you are doing? (All defendants nodded in the affirmative.)

THE COURT: He's advised you that you have a right to testify or not to testify if you desire? (All defendants nodded in the affirmative.)

MR. HALL: I am in a position now where I am more or less muzzled as to any cross-examination.

THE COURT: You have no right to cross-examine your own witness.

MR. HALL: Or to examine them.

THE COURT: You have a right to examine them, but you have no right to cross-examine them. The prosecuting attorney does that.

MR. HALL: If one takes the stand, somebody needs to protect the other two's interest while that one is testifying, and I can't do that since I have talked to each one individually.

THE COURT: Well, you have talked to them, I assume, individually and collectively, too. They all say they want to testify. I think it's perfectly alright for them to testify if they want to, or not. It's their business.

MR. HALL: Save my exceptions.

THE COURT: You are overruled.

During the Public Defender's direct examination of Defendant Welch, the following colloquy occurred when in response to a question, the Defendant Welch stated that he wasn't there (R. 255-256; App. 29-30):

DEFENDANT HOLLOWAY: Your Honor, are we allowed to make an objection?

THE COURT: No, sir, your counsel will take care of any objections.

MR. HALL: Your Honor, that is what I'm trying to say. I can't cross-examine them.

THE COURT: You proceed like I tell you to, Mr. Hall. You have no right to cross-examine your own witness anyhow.

The Court, by stating that the Public Defender had no right to cross examine his own witnesses prevented the Public Defender in this part from providing effective individual defenses to the co-defendants, Holloway and Campbell. This would apply to each co-defendant while one of the co-defendants testified. This was objected to by the Public Defender throughout the trial.

ARGUMENT

THE THREE DEFENDANTS WERE DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE PUBLIC DEFENDER WAS APPOINTED TO REPRESENT THEM IN THE SAME TRIAL OVER THEIR OBJECTIONS.

Effective assistance of counsel is assistance untrammeled and unimpaired by court order requiring that one lawyer shall simultaneously represent conflicting interests; and if counsel must represent conflicting interests or is ineffective because of the burden of representing more than one defendant, the injured defendant has been denied his constitutional right to effective counsel.

The Sixth Amendment right to effective assistance of counsel includes the right to a lawyer who is not obliged to serve conflicting interests at the same time.

In the present case, the defense counsel filed a Motion for Severance and a motion for separate counsel which were denied by the Court. Further, when defense counsel was examining one of the defendants (App. 29-30) a co-defendant asked if he could make an objection to which the Court replied "No, sir, your counsel will take care of any objections." It is unheard of for an attorney who is asking questions on direct examination of a witness, who is one of

his three clients, to "object" to his own question in behalf of one of the co-defendants.

In Commonwealth v. Maroney, 208 Pa. Super. 172, 220 A.2d 405 (1966), the Superior Court of Pennsylvania held that:

> "If, in the representation of more than one defendant, a conflict of interest arises, the mere existence of such a conflict vitiates the proceedings, even though no actual harm results, rather than that such harm did result, furnishes the appropriate criterion." *Commonwealth ex rel. Whitling v. Russell*, 406 Pa. 45, 176 A.2d 641 (1962).

In *State v. Montgomery*, 182 Neb. 737, 157 N.W.2d 196 (1968), the Court held that single counsel could not, at a joint trial, effectively serve the interests of two co-defendants where the confession of one was admitted into evidence putting the entire responsibility for the alleged robbery on the other, even though the confessing defendant at trial repudiated this confession. The court, therefore, reversed the robbery conviction of the inculpated defendant.

In *People v. Chacon*, 73 Cal. Rptr.; 447 P.2d 106 (1968), in a prosecution of four defendants jointly charged, as life prisoners, with malicious assault with a deadly weapon on a fellow convict, the refusal of the trial judge to provide separate counsel for each of the three defendants actually convicted, deprived them of the right to effective assistance of counsel and required reversal of the judgments as to both guilt and penalty, where at no time did the court indicate to these defendants that separate counsel might be appointed for each of them, where their only choice was to accept one attorney for all or proceed without an attorney, and where, although a common defense was presented by counsel representing all three defendants and the record was silent as to evidence that might have been developed on behalf of each if separately represented, the facts of the case were frought with potentially effective individual defenses which could not be presented by counsel common to all three.

In *State v. Brazile*, 226 La. 254, 75 So.2d 856 (1954), the court reversed and remanded a first degree murder conviction because the trial court failed to appoint separate counsel for each of the co-defendants, where the appointed counsel had argued to the trial court that he was unable to represent both accused to the degree of efficiency required in a capital case in that he was unable to plead mitigation of one defendant for fear of prejudicing the other.

The Supreme Court of Illinois held in *People v. Johnson*, 46 Ill.2d 266, 265 N.E.2d 869 (1970), that where a Public Defender was appointed to represent defendant and two co-defendants did not object to dismissal of charges and entry of an immunity order as to one co-defendant, who went free and subsequently testified against defendant, defendant did not receive effective assistance of counsel because of a conflict of interest; the conviction was reversed and a new trial ordered.

In the present case the Public Defender could not cross-examine any of the three defendants because he was under a duty not to disclose information given him by them under the attorney-client relationship.

In the case of *People v. Halluin*, 36 Ill. App.3d 556, 344 N.E.2d 579 (1976), the Court held:

> "Where co-defendant pled guilty and was sentenced, and then appeared as sole witness directly placing defendant at scene of crime, and where attorney representing both defendant and co-defendant did cross-examine the co-defendant and generally impugned his credibility in closing argument, but cross-examination appeared less than thorough, joint representation involved conflict of interest, there being a duty on part of attorney not to disclose statements given to him by co-defendant in context of their attorney-client relationship, and reversal was required.

In the present case the Public Defender talked to each one of the defendants individually (App. 22-23) and therefore any statements made by them were confidential between the attorney and client. In the case of *Olds v. State*, Fla. App.,

302 So.2d 787 (1974), the Public Defender was summarily found to be in contempt of court in attempting to cross-examine State's witness who had previously been represented by Public Defender's office and had pled to reduced charge in same homicide where subject matter of attempted cross-examination included statements made by witness in presence of third parties and matters of public record. In reversing the contempt of court adjudication, the Court held that confidentiality rights may be waived by making them in the presence of third parties or they are a matter of public record. The Court went on to say that where the witness had privately given the Public Defender damaging information which he would be required to elicit in the instant trial, it would obviously be a conflict which would not be countenanced.

The Court of Appeals of Kentucky held in *Maynard v. Commonwealth*, 507 S.W.2d 143 (1974), that the refusal to appoint separate counsel to represent three co-defendants, after their appointed attorney stated that they had antagonistic defenses, was reversible error.

Ours is an adversary system of justice. To make such a system work, the adversaries must approach the trial as equals. This can only be achieved by competent counsel armed with the weapons of law to meet the State's weapons of superior manpower and funding.

To be properly armed, the attorney must be fully appraised of the facts upon which his client's case is based. The client must be able to freely disclose those facts without fear of his counsel cross-examining him with it for the benefit of a co-defendant.

The attorney-client privilege is of ancient origin and is fundamental to all other Constitutional protections afforded the defendant charged with a crime. Were there no confidentiality between attorney and client, the defendant would be at the mercy of the State, unable to adequately defend himself alone, but equally unable to confide in an attorney for fear that any information divulged to that

attorney would be used against him on cross-examination by his attorney who would be representing a co-defendant. Placing the defendant in such a position is abhorrent to our concepts of due process and justice under law.

The American Bar Association's approved draft on Standards Relating to the Prosecution Function and the Defense Function published by the Institute of Judicial Administration states in the Defense Function, Section 3.5(b):

> ". . . The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the defendants give an informed consent to such multiple representation."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

HAROLD L. HALL
Public Defender
601 W. 2nd Street
Little Rock, Arkansas 72201
(501) 374-9203

Attorney for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5856

Winston Holloway, Ray Lee Welch and
Gary Don Campbell ..... *Petitioners*

vs.

State of Arkansas ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT

BILL CLINTON
Attorney General
State of Arkansas

By: ROBERT ALSTON NEWCOMB
Assistant Attorney General
Member of the Bar of this Court
and
JOSEPH H. PURVIS
Assistant Attorney General

JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

Attorneys for Respondent

Req. No. 76-14689 45 Copies

INDEX

CASES CITED

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5856

Winston Holloway, Ray Lee Welch and
Gary Don Campbell ..... *Petitioners*

vs.

State of Arkansas ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Arkansas (Pet. App. A) is reported at 260 Ark. ____, 539 S.W. 2d 435 (July 10, 1976).

JURISDICTION

Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. §1257(3).

QUESTION PRESENTED

The question presented is whether the three defendants were denied effective assistance of counsel by the order of the

trial court appointing the Public Defender to represent them in the same trial over their objection.

STATEMENT OF THE CASE

In the early morning hours of June 1, 1975, three men robbed the Leather Bottle Restaurant in Little Rock. During the course of the robbery two female employees were raped.

The defendants were arrested at different times and placed in separate line-ups at different times, and identified by the five witnesses who were in the Leather Bottle. Appellant Campbell made an oral statement incriminating himself and the two other appellants in the crimes. The statement was used against him at trial, but all references to the other appellants were deleted.

The Public Defender was appointed to defend all three defendants who were tried jointly because they were not charged with a capital offense. Ark. Stat. Ann. §43-1802 (Repl. 1964). The counsel for appellants made a motion for separate counsel citing a possible conflict of interest in representing defendants who might attempt to incriminate one another. This motion was denied and the purported conflict never arose at trial.

On September 4, 1975, the defendants were brought to court in their jail clothing and so appeared in front of the prospective jurors. Appellants moved for a mistrial based on this incident. The trial court denied that motion but offered appellants the opportunity to change clothes before the trial began. Appellants ignored this offer and proceeded to trial.

On September 5, 1975, the jury returned a verdict of guilty

against each defendant and sentenced each of them to life imprisonment on each of the two charges of rape and to 21 years for robbery.

On July 19, 1976, the Arkansas Supreme Court affirmed the petitioners' convictions. On September 20, 1976, that Court entered its final judgment upon denying rehearing.

POINTS TO BE RELIED UPON

I.

THE THREE DEFENDANTS WERE NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE PUBLIC DEFENDER WAS APPOINTED TO REPRESENT THEM IN THE SAME TRIAL OVER THEIR OBJECTIONS.

II.

THIS COURT SHOULD NOT ADOPT A RULE WHEREBY REPRESENTATION OF MULTIPLE DEFENDANTS BY SINGLE COUNSEL IS PER SE UNCONSTITUTIONAL, NOR SHOULD THIS COURT ADOPT A RULE WHEREBY THE DETERMINATION OF WHETHER THERE IS IN FACT A CONFLICT IS MADE BY THE DEFENSE ATTORNEY ALONE.

III.

THE DECISION SHOULD ULTIMATELY REST WITH THE TRIAL COURT.

ARGUMENT

THE THREE DEFENDANTS WERE NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE PUBLIC DEFENDER WAS APPOINTED TO REPRESENT THEM IN THE SAME TRIAL OVER THEIR OBJECTIONS.

It has long been held that:

> "... the assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Glasser* v. *United States*, 315 U.S. 60, 70 (1942).

This language stands on its own footing, and it should be noted that it does *not* stand for the proposition that the representation of multiple defendants by a single attorney amounts to a per se deprivation of their Sixth Amendment right. *United States* v. *Carrigan*, 543 F. 2d 1053, 1055 (2nd Cir. 1976); *United States* v. *Huntley*, 535 F. 2d 1400, 1406 (5th Cir. 1976); *United States* v. *Donner*, 497 F. 2d 184, 196 (7th Cir. 1974); *United States ex rel Hart* v. *Davenport*, 478 F. 2d 203, 210 (3rd Cir. 1973); *United States* v. *Williams*, 429 F. 2d 158, 160, 161 (8th Cir. 1970); *Watkins* v. *Wilson*, 408 F. 2d 351, 352 (9th Cir. 1969); *Fryar* v. *United States*, 404 F. 2d 1071, 1073 (10th Cir. 1968), cert. den. 395 U.S. 964 (1969).

Thus, it can be said that in order for there to have been a deprivation of the right to effective counsel there must be a conflict between the interests of the co-defendants. This conflict is not of an imaginary or hypothetical nature, *Foxworth* v. *Wainwright*, 516 F. 2d 1072 F.N. 7 at 1077 (5th Cir. 1975);

Jackson v. *United States,* 404 F. Supp. 1134, 1137 (E.D. Pa. 1975); but, rather, the general rule employed requires that some specific instance of prejudice must be shown to exist; *United States* v. *Lovano,* 420 F. 2d 769, 773, F.N. 14 at 774 (2nd Cir. 1970); *United States* v. *Mandell,* 525 F. 2d 671, 677 (7th Cir. 1975); *Marxuach* v. *United States,* 398 F. 2d 548, 551, 552 (1st Cir. 1960), cert. den. 393 U.S. 982 (1960); *Lugo* v. *United States,* 350 F. 2d 858, 859 (9th Cir. 1965); *United States* v. *Carrigan,* supra, 543 F. 2d at 1055; *United States* v. *Burkeen,* 355 F. 2d 241, 244 (6th Cir. 1966), cert. den. sub nom. *Matlock* v. *United States,* 384 U.S. 957 (1966); *American-Canadian Oil and Drilling Corp.* v. *Aldridge and Stroud,* 237 Ark. 407, 410, 373 S.W. 2d 148 (1963); *State* v. *Alexander,* 334 S. 2d 388, 391 (La. 1976); *People* v. *St. Pierre,* 25 Ill. App. 3rd 644, 324 N.E. 2d 226, 231 (1975).

In the case at bar, petitioner Campbell made a pretrial confession which implicated the co-defendants, and a pretrial *Denno* hearing on its admissibility was held, wherein the trial court admitted the statement as to Campbell and ordered the names of the co-defendants struck. Prior to the hearing, petitioner's counsel filed a motion for the appointment of separate counsel, based upon the assertion that "there is a *possibility* of a conflict of interest in each of their cases . . ." (Appendix 10) (Emphasis supplied) At the close of the hearing, the petitioner's attorney orally renewed his motion for separate counsel, stating "one or two of the defendants may testify, and if they do I will not be able to cross-examine them because I have received confidential information from them." (Appendix 22)

The Petitioner's motions indicated nothing more than a *possibility* of conflicting interests here. There is always the *possibility* of conflicting interests in any case with joint defendants and the existence of more than such possibility is required

to establish a deprivation of the Sixth Amendment right. *United States* v. *Gallagher,* 437 F. 2d 1191, 1194 (7th Cir. 1971), cert. den. 402 U.S. 1009 (1971); *United States* v. *Lovano,* supra. *American-Canadian Oil and Drilling Corp.* v. *Aldridge and Stroud,* supra; *United States* v. *Mari,* 526 F. 2d 117, 119 (2nd Cir. 1975;. Clearly the petitioners have not demonstrated that there was an actual or even a substantial possibility of a conflict of interest.

That there was no conflict of interest among the petitioners is further supported by the fact that all of them took the stand and the record reflects the gist of testimony to be as follows:

> "(1) Winston Holloway alleged, in accordance with the testimony of his brothers, that he was at his brother's home during the time of the robbery-rape incident caring for his brother who was recuperating from surgery; and
>
> (2) Ray Lee Welch testified that he was at home during the entire night of the crime with his half-brother, co-defendant Gary Don Campbell; and
>
> (3) Gary Don Campbell testified that he had never been to the restaurant where the robbery-rape took place, that he had never made a contrary statement to the police about his complicity and that he did not know Winston Holloway by name."

All of the petitioners testified that the victims lied when they made positive identification of them as the perpetrators of the crimes. (Appendix 26-33)

The record further reflects that all of the petitioners pursued an alibi defense and neither the petitioners nor their

counsel indicated that there was a conflict among the defenses. Also they did not demonstrate that they were precluded the use of any plausible defense nor any defense at all for that matter.

These matters are certainly not sufficient to find that petitioners were denied their right to effective assistance of counsel. While the evidence may have been stronger as to Petitioner Campbell due to the introduction of his statement, "the mere fact that the evidence could be said to be stronger against one co-defendant than another does not indicate, much less demonstrate the existence of a conflict of interest among the defendants." *United States* v. *Donner*, supra, 497 F. 2d at 196; *United States* v. *Gallagher*, supra, 437 F. 2d at 1194; *United States* v. *Mandell*, supra, 525 F. 2d at 677, 678.

The fact that the petitioners employed compatible defenses coupled with the absence of any contention that they were precluded the use of any plausible defense further substantiates the fact that they were not deprived the effective assistance of counsel. *Foxworth* v. *Wainwright*, supra, 516 F. 2d at 1079; *United States ex rel Small* v. *Rundle*, 442 F. 2d 235, 238 (3rd Cir. 1971); *United States* v. *Huntley*, supra, 535 F. 2d at 1406; *Ware* v. *Commonwealth*, 537 S.W. 2d 174, 177, 178 (Ky. 1976); *State* v. *Alexander*, supra, 334 S. 2d at 391; *People* v. *Gomberg*, 38 N.Y. 2d 307, 379 N.Y.S. 2d 769, 342 N.E. 2d 550, 553 (1975); *Jones* v. *State*, 527 P. 2d 169, 175 (Okla. Cr. 1974); *People* v. *St. Pierre*, supra, 324 N.E. at 231.

The petitioners contend that they made no revelation to the trial court of any facts which would show a conflict because such information was confidential. In this regard, the respondent notes that Disciplinary Rule 4-101(c)(2) provides that "A lawyer may reveal confidences or secrets when permitted under

the Disciplinary Rules or required by law or court order." Certainly, where any confidential information may be necessary to establish the existence of a conflict of interest, the revelation of such to the trial court in an *in camera* proceeding could easily be said to be within the ambit of DR 4-101(c)(2).

The respondent also notes that this topic was touched on by the court in *United States* v. *Jeffers*, 520 F. 2d 1256, 1262, 1265 (7th Cir. 1975), and was noted by the Arkansas Supreme Court in its opinion at the case at bar:

> "Thus, if defense counsel was concerned that he might be using confidential information improperly, he could have outlined the nature of the information to the judge and, if necessary, made an *in camera* disclosure to him. On the basis of such a disclosure it might have become apparent that the privilege was either inapplicable or had been waived by the witness. Or it might have been clear that the information was not usable for other evidentiary reasons."

Holloway, Welch and Campbell v. *State*, 260 Ark. ____, 539 S.W. 2d 435, 440 (1976).

The Amicus on behalf of the National Legal Aid and Defender Association raises the contention that the admission of Campbell's confession inculpates both Holloway and Welch and operated to deny both Holloway and Welch their right of confrontation to attack that part of the confession involving them, pursuant to *Bruton* v. *United States*, 391 U.S. 123 (1968). It should be initially noted that both Holloway and Welch's names had been deleted from the confession and it could not be said to inculpate them. The contention raised by the Amicus is based upon the hypothesis that had there been separate

counsel, Campbell would have admitted making the confession and would have proceeded under a defense that it was his two co-defendants who raped the victims and he was therefore less culpable.

The respondent notes that such a contention is mere speculation and nothing more and one could engage in such speculation and hypothesis on almost any issue arising at trial. The respondent would further point out the fact that there is nothing in the record which bears out the Amicus contention; indeed, the record disclosed that Campbell pursued the same defense, denial of the statement at his Denno hearing several days prior to trial.

In summation, the State of Arkansas requires a showing of something more than a mere *possibility* of conflicting interests among co-defendants in order to find a deprivation of the right to effective counsel. There is then a duty upon counsel requesting the appointment of multiple counsel to identify with specificity the nature of the conflict that will arise. In this regard, Arkansas is in accord with the bulk of appellate jurisdictions. *United States* v. *Williams,* supra; *Foxworth* v. *Wainwright,* supra; *United States* v. *Mandell,* supra; *Marxuach* v. *United States,* supra; *United States* v. *Lovano,* supra.

The record in this case indicates that the petitioners failed to meet their burden of identifying the specific nature of the conflict and/or that conflict actually did exist. The record reflects that the petitioners did not claim that they were deprived of any plausible defense or denied any defense for that matter; the record further reflects that the petitioners had alibi defenses which were concurring and complementary. This in numerous jurisdictions have found such a situation to deny the existence of

an actual conflict. *Gonzales* v. *United States,* 314 F. 2d 750 (9th Cir. 1973); *People* v. *Spencer,* 45 Mich. App. 440, 206 N.W. 2d 733 (1973); *State* v. *Andrews,* 106 Ariz. 372, 476 P. 2d 673 (1970); *Commonwealth* v. *Heard,* (Pa. Super 1973) 303 A. 2d 831. The record reflects that the petitioners offered merely their conclusion that conflict existed, rather than any facts on which the trial court could have based such a decision.

Clearly, the lower court did not err in ruling that the petitioners were not denied their Sixth Amendment right to effective counsel.

II.

THIS COURT SHOULD NOT ADOPT A RULE WHEREBY REPRESENTATION OF MULTIPLE DEFENDANTS BY SINGLE COUNSEL IS PER SE UNCONSTITUTIONAL, NOR SHOULD THIS COURT ADOPT A RULE WHEREBY THE DETERMINATION OF WHETHER THERE IS IN FACT A CONFLICT IS MADE BY THE DEFENSE ATTORNEY ALONE.

The Amicus from the State of Colorado does not deal with the facts of the case, but rather, states that this Court should adopt a rule whereby representation of multiple defendants by a single attorney is a per se deprivation of the Sixth Amendment right to effective counsel. The respondent submits that such a suggestion is not warranted by the Constitution; indeed, such a rule would amount to "burning down the barn to get rid of rats."

The Sixth Amendment to the United States Constitution guarantees each criminal defendant the right to effective

counsel. *Powell* v. *Alabama*, 287 U.S. 45 (1932). In *Glasser* v. *United States*, supra, this Court pronounced the rule that there could be no effective counsel in situations where the *counsel must simultaneously represent conflicting interests*. *Glasser* v. *United States*, supra, 315 U.S. at 70. (Emphasis supplied) The Court did not say that single counsel's representation of multiple defendants was *per se* unconstitutional and we know of no jurisdiction, nor has the Amicus cited to any, which so hold.

Therefore, it is *only* when in the course of such a relationship that a conflict is shown to exist between the interests of the defendants so that counsel is forced to compromise to the extent that one or more of the defendants is prejudiced, that the defendants are denied their right of effective assistance in counsel. Thus, it is only when a conflict of interest exists that prejudice can be said to inure and it is that prejudice resulting from the conflict which effectuates the deprivation of effective counsel.

If the Amicus from Colorado were to suggest that there should be a presumption that multiple representation is unconstitutional and the burden is on the state to prove otherwise, it could be said that he was putting the cart before the horse. Amicus advocates a rule, however, that would not allow the state to prove such, and he therefore seems to suggest that the cart would not work, save being pushed by an entire team of horses.

The entire argument of Amicus is centered upon his fallacious assumption that there is *always* a conflict in every criminal case involving multiple defendants. We believe, along with the overwhelming majority of jurisdictions, that such assumption paints with too broad a stroke.

The Amicus argument bases a goodly portion of his argument upon § 3.5(b) of A.B.A. standards for Criminal Justice, standards relating to the defense functions.

While respondent recognizes the importance of § 3.5(b), it is clear that the standard espoused by it does not amount to a rule that representation of multiple defendants by one attorney is per se unconstitutional, nor does it amount to a constitutional mandate. In fact, the American Bar Association standards assert its own latitude. See, *United States ex rel Robinson* v. *Housewright*, 525 F. 2d 988, 994 (7th Cir. 1975).

The Amicus also suggests that the refusal of this Court to adopt the rule which he is advocating would amount to a denial of Equal Protection under the law in violation of the Fourteenth Amendment to the United States Constitution. He bases his conclusion upon the invalid premise that retained counsel may withdraw from a case at any time, while appointed counsel may not. That this premise is invalid is borne out by a myriad of cases which hold retained and appointed counsel to be on equal footing in this area. See, generally, *Anders* v. *California*, 386 U.S. 738 (1967); *Waits* v. *McGowan*, 516 F. 2d 203 (3rd Cir. 1975); *Brown* v. *Joseph*, 463 F. 2d 1046 (2nd Cir. 1972); *Lessenberry* v. *Adkisson and Howard*, 255 Ark. 285, 294, 295, 296, 297, 298, 499 S.W. 2d 835 (1973); *Riley* v. *District Court In and for the Second Judicial District*, 181 Col. 90, 507 P. 2d 464, 465 (1973); and *Ex Parte Mays*, 152 Tex. Crim. 172, 212 S.W. 2d 164 (1948).

The respondent would once again note that the key issue here is whether conflict exists between the interests of the co-defendants and where such is established, courts have not hesitated to direct a reversal. *United States* v. *Williams*, supra, 429 F. 2d at 161.

There can be no doubt that the rule suggested by the Amicus from Colorado would *lessen* the claims of denial of effective counsel in cases where one attorney represented multiple defendants. We use the word "lessen" because respondents realize that under Amicus' rule where joint representation is allowed after waiver, the claims would arise that the waiver was not voluntary or was otherwise tainted. The respondents would state, however, that the rule espoused is both unjustified and unwarranted and therefore we cannot subscribe to such a rule.

The Amicus for the National Legal Aid and Public Defender Association, on the other hand, realized that some conflict of interest must be shown to exist before there can be a deprivation of the right to effective counsel. Amicus suggests a rule whereby the responsibility for ascertaining the existence of such conflict rests with the defense attorney, who, upon finding the existence of such, would consult with this client and then withdraw. The problem with this proposed rule is that it would not involve the trial court.

The Amicus states that such rule is mandated for several reasons:

> (1) The Amicus suggests as reason for adoption of this rule that it is often impossible to identify specific conflicts until very near the date of trial. The respondent suggests that a determination that there is a conflict at a time very near the trial date would pose no greater hindrance to the trial court than it would the defense counsel. The Amicus states that the delay resulting from following the rule employed by the Arkansas courts would result in many trials being delayed due to the need for an eleventh hour counsel change. The respondent fails to see how this need would be

> any worse than if defense counsel himself determined that there was a conflict at the eleventh hour and suddenly announced that he was abandoning the case of a particular co-defendant at that time.

The key issue where a substitution of counsel is necessary is the protection of the accused's rights. It seems quite implicit that the steady supervision of the impartial trial court is necessary in order to insure that any last minute withdrawal is justified and to insure that the accused's rights are indeed protected.

> (2) The Amicus asserts that his suggested rule is mandated because the relevation of any confidential information would be a gross violation of an attorney's ethical obligations. Such reasoning automatically assumes that it is almost always necessary to impart confidential to the trial court in order to show that a conflict did in fact exist. The respondent does not believe such to be the case.

Additionally, the respondent points to DR 4-101 (c) (2) which states:

> "(c) a lawyer may reveal:
>
> . . .
>
> (2) confidences or secrets when permitted under Disciplinary Rules or required by law or court order."

Certainly, any time confidential information was required to be imparted to the trial court in order for it to determine

whether a conflict did in fact exist, such could be said to be within the ambit of DR 4-101(c)(2).

Finally, the respondent notes there seems to be an underlying suggestion of Amicus that if counsel was forced to disclose some of his confidential information to the trial court, that such information would not remain confidential. In this regard, the respondent points to §§ 1.5 and 3.7(b) of the *ABA Standards Relating to the Function of the Trial Judge*, approved draft, 1972, wherein state respectively:

> 1.5 Duty to maintain impartiality.
> The trial judge should avoid impropriety and the appearance of impropriety in all his activities, and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
> 3.7 (b) The trial judge should refrain from making public comment on a pending case or any comment that may tend to interfere with the right of any party to a fair trial and should otherwise be familiar with ABA Standards, Fair Trial and Free Press, and implement them as required.

(3) The Amicus next contends that disclosing information to the court would be inherently prejudicial to the defense. The respondent agrees with Amicus that such might be the case if such disclosure were made in open court; it cannot so agree that such would be the case of done *in camera*.

In this regard, the Amicus states that the defendant will be prejudiced simply if the trial court is aware of the factors which lead counsel to seek withdrawal and the confidential information may reflect upon one of the defendants' credibility. Such is not the case.

Apart from the fact that not every determination of a conflict involves confidential information, and apart from the fact that the trial court is ethically bound to impartiality, the fact remains that trial courts are faced with identical situations daily in hearings to determine the admissibility of confessions pursuant to *Jackson* v. *Denno*, 378 U.S. 368 (1964). Certainly no more pressure or prejudice could be said to inure from the disclosure of facts creating a conflict of interest between co-defendants than that which flows from hearing the confession of a defendant prior to his trial. *Jackson* v. *Denno*, id., did not mandate that a judge who has determined that a confession was not constitutionally obtained and is therefore inadmissible, was thereby incompetent to hear the trial of the confessor; likewise, we find nothing impermissible in a court which has heard information which the defense attorney believes sufficient to establish a conflict of interest between co-defendants, hearing their trial on the merits.

(4) The Amicus next contends that his rule must be adopted because Arkansas' procedure makes appellate review impossible. Arkansas employs the procedure adopted by a great number of courts of appeal, and if Amicus' contention is valid, there would be no reported cases dealing with allegations of deprivation of the right to effective counsel due to multiple defendants and a single attorney.

Apart from this, the Amicus' contention is founded upon two invalid presumptions. The first of these is that

the possibility of leaking confidential information by the State is an insurmountable barrier to appellate review. While the respondent would admit that such a problem does exist, it does not follow that it is an insurmountable one.

In this situation, an analogy can be drawn to cases dealing with governmental secrets, whereby a showing of the evidence may be made in an *in camera* proceeding. After all parties are apprised of the evidence, the court may take any protective measures it sees fit to safeguard the interests of the government and the furtherance of justice. See, generally, *Federal Rules of Evidence,* 509 (Dec. 1976).

The second premise upon which the Amicus bottoms his contention is identical to that which he espoused in (3); i.e., that no court apprised of the facts giving rise to the alleged conflict of interests could ever preside over a fair trial of the individuals. This contention is meritless for the same reasons as stated in (3).

(5) The Amicus contends that it is neither necessary nor appropriate for defense counsel to identify the conflict of interest to the trial court before the defendants are entitled to representation by separate counsel, since the issue is the attorney's honest, but subjective, relief.

As supportive of his argument, he cites to the ethical considerations of the American Bar Association. It should be noted that the EC 5-14, 5-15- 5-17, while offering guidelines for ethical standards, they do not state that all multiple representations are unethical, and unconstitutional, rather, they merely serve to remind the attorney of the *potential* for ethical danger in that sort of situation. In order to invoke these guidelines, it must be shown that the interests of the defendants are conflicting or differing.

The Amicus next asserts that adoption of his rule is necessary since to refuse to do so constitutes an 'equal protection' denial for appointed counsel. He seems to base this contention upon the assumption that retained counsel may withdraw from a case at any time.

Such is patently not the case, as is pointed out in *Lessenberry* v. *Adkisson and Howard,* supra, 255 Ark. at 295, 296, where the court quoted from *Riley* v. *District Court in and for Second Judicial District,* 181 Cal. 90, 507 P. 2d 464:

> "... a motion by an attorney for leave to withdraw for any reason is addressed to the sound discretion of the court and like all motions, it may or may not be meritorious. For that reason, a burden rests with the moving party to prove to the court's satisfaction of legitimacy of the request, and when the petitioner either fails or refuses to do so, the court may properly deny the motion. ..."

The withdrawal of any attorney from a case is a serious matter and may be done not at counsel or client's whim but with the permission of the trial court. In that regard, the trial court has the duty to fully ascertain the justification for a counsel's withdrawal. It should be noted that when counsel representing multiple defendants contends that separate counsel should be appointed for at least one of his clients, necessitating his withdrawal as that person's counsel, the trial court likewise, has

the duty of ascertaining whether there is in fact adequate justification for that action.

In this regard, we note the language employed in the Introduction to the *A.B.A. Standards Relating to the Function of the Trial Judge:*

> "Representing the overriding social interest and change with the obligation to do exact justice according to law, the judge, of course, is expected to be a neutral factor in the interplay of adversary forces. . . . Given the mandate of neutrality the role of the judge is not that of a mere functionary to preserve order and lend ceremonial dignity to the proceedings as the central figure at the trial mantled with neutrality, it is the judge's responsibility to direct and guide the course of the trial in such a manner as to give the jury fair opportunity in the opposite actions of the adversary parties to reach an impartial result on the issue of guilt. The teaching of the history of common law nations is that the trial judge, adhering to his neutral role, should possess, nevertheless, power to curb both adversaries in order that independent courts be maintained for the rational enforcement of the rights of free men. Provided that he acts judicially and with due regard for the rights of the defendant, the trial judge should be empowered to clarify obscurity in issues or evidence, prevent unnecessary delay, and promote the expeditious, fair and dignified course of the trial." *ABA Standards Relating to the Functions of the Trial Judge, Introduction,* P. 3 (Approved, 1972).

With this in mind, we note that Amicus contends that the issue is not whether a judge would find a conflict but rather counsel perceives one to exist, and following his rule at that

point whenever in the proceeding the defense counsel makes his discovery the trial court has no choice but to halt everything and appoint separate counsel.

The respondent acknowledges that whenever a conflict is found, a remedy is immediately mandated, be it appointing separate counsel, or the granting of a new trial. Amicus noted that it is often late in the .proceedings before such conflict is found. Because of the grave ramifications upon the discovery of conflict and because of the definite devastating possibilities for abuse by unscrupulous counsel, the respondent submits there is all the more reason for requiring the impartial trial court be the one making the ultimate decision as to whether there is conflict.

The respondent submits that it is precisely for these reasons that the vast majority of jurisdictions place the ultimate decision of whether there is a conflict in the hands of the trial court. See, *United States* v. *Mandell,* supra, 525 F. 2d at 676; *United States* v. *Lovano,* supra, 420 F. 2d at 774, fn. 14; *Holloway, Welch and Campbell,* supra, 539 S.W. 2d at 439.

III.

THE DECISION SHOULD ULTIMATELY REST WITH THE TRIAL COURT.

The respondent would agree with the National Legal Aid and Defender Association that the primary responsibility for the ascertainment and avoidance of conflict situations must lie with members of the bar. The rule suggested by the respondent, however, would not stop there, but would state that the attorney, believing that he has ascertained such, must notify and inform his clients and the trial court. At that point, the trial

court would hold an *in camera* hearing, wherein the attorney would disclose sufficient facts to the court upon which to make its decision.

If the trial court then found that a conflict was shown, it would then appoint separate counsel. If the trial court did not find a conflict to exist and the appellants disagreed with that decision, the trial would continue if in progress and the matter would be covered as a point in the defendants' appeal, should they be convicted; if the point were raised prior to trial, the matter could be covered by way of petition for certiorari to the appellate court.

CONCLUSION

For the reasons set forth herein, respondent respectfully prays that the decision of the Arkansas Supreme Court be affirmed and the conviction upheld.

Respectfully submitted,

BILL CLINTON
Attorney General
State of Arkansas

By: ROBERT ALSTON NEWCOMB
Assistant Attorney General
Member of the Bar of this Court
and
JOSEPH H. PURVIS
Assistant Attorney General

JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5856

WINSTON M. HOLLOWAY,
RAY LEE WELCH, and
GARY DON CAMPBELL,
Petitioners,

v.

STATE OF ARKANSAS,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ARKANSAS

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

HOWARD B. EISENBERG
State Public Defender
State of Wisconsin
123 West Washington Avenue
Main Floor
Madison, Wisconsin 53702

Counsel for N.L.A.D.A. as Amicus Curiae

National Legal Aid and
Defender Association
2100 M Street, N.W.
Washington, D.C. 20037

INDEX AND SYNOPSIS OF ARGUMENT

CASES CITED

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

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INTEREST OF N.L.A.D.A. AS AMICUS CURIAE

(1) The National Legal Aid and Defender Association (N.L.A.D.A.) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. The Association also includes four thousand individual members, most of whom are private practitioners.

(2) The interest of N.L.A.D.A. in this case is limited to the first issue raised in the petition for writ of certiorari. This issue relates to the refusal of the trial court to grant the petitioners' and public defender's request to have separate counsel appointed to represent each of the three defendants. On appeal, the Arkansas Supreme Court affirmed the trial court's action, three justices dissenting.

(3) Members of N.L.A.D.A., as both public defenders and publicly compensated, assigned, private counsel, are often placed in the same situation as counsel in the instant case. Publicly compensated counsel are often required to represent multiple defendants due to the high cost of providing separate counsel to each defendant. It is the vehement position of N.L.A.D.A. that to deny the request to designate separate counsel for each defendant not only denies each defendant his or her constitutional right to effective representation by counsel, but also places the assigned attorney in the position of being required by the appointing court to engage in unprofessional conduct which would not be proper or acceptable in the case of a privately retained lawyer.

(4) N.L.A.D.A. has received the consent of both parties for the filing of this brief.

SUMMARY OF ARGUMENT

I.

The National Legal Aid and Defender Association submits that the trial court's denial of defendants' request to be represented by separate counsel denied each of the defendants his constitutional right to counsel in at least four specific respects. Initially, the multiple representation by Mr. Hall precluded him from pursuing vigorously effective pretrial negotiations on behalf of any of his

clients. Secondly, such multiple representation made it difficult to investigate the case on behalf of all three defendants and impossible to disclose facts to one defendant if gained through a confidential interview with another of the defendants. The fact that Mr. Hall was required to represent all three defendants at trial made it impossible for him to cross-examine any of his clients on behalf of his other clients and to protect the rights of each of his clients while conducting direct examination of any one defendant. Such multiple representation also constituted a denial of effective representation to each of the defendants in relation to sentencing.

The combination of these, and other, factors resulted in the defendants being denied effective representation at trial, and thus the judgment of the Arkansas Supreme Court must be reversed.

II.

It should not be necessary for an attorney, acting in good faith, to disclose to the trial judge the specific, factual basis of the conflict of interests between codefendants. Under the Code of Professional Responsibility the issue is not whether there is an actual conflict, but whether counsel's loyalty and judgment on behalf of any client is diluted because of the necessity of multiple representation. Moreover, it is often impossible for counsel to specify the exact facts which constitute the basis for the conflict until the eve of trial, thereby resulting in undesirable delays in proceeding.

N.L.A.D.A. asserts that requiring an attorney to reveal information gained in confidence from a criminal defendant to the trial judge, either in the presence of the prosecution or *in camera*, would be inherently prejudicial to such defendant because such information would be used by the

prosecution against all or some of the defendants and could influence the court at the time of sentencing, consideration of pretrial suppression motions, or other points in the trial.

III.

It is the fundamental position of N.L.A.D.A. that the decision of whether a conflict exists must be left to the defense attorney after advising his clients of their rights and of any possible or actual conflicts. Even where there is a conflict, the defendants can waive such problems and elect to be represented by the same attorney, and under no circumstances can a court order a defendant to obtain or accept separate counsel when the defendants waive the right to be represented by different attorneys.

ARGUMENT

I. Each Defendant Was Denied His Constitutional Right To Effective Representation By Counsel By Virtue Of Assigned Counsel's Belief That There Was A Conflict Among The Three Defendants.

The N.L.A.D.A. believes that the ultimate issue involved in this case is whether defendants' trial attorney was obligated to specify to the trial court what specific conflicts existed among his three clients which prevented him from providing effective representation to all three men at trial. While *amicus* will deal with this question in the second section of this brief, this issue is also involved with the concept of an attorney's ability to provide effective representation to anyone when he or she *believes* there is a

conflict of interest, assuming that counsel is proceeding in good faith.[1]

Effective representation under the constitution involves much more than simply appearing in court and conducting examination and cross-examination. Frankly, it is not always possible from reviewing a court record to determine whether a defendant was afforded effective representation. That is especially true in the instant case wherein counsel may well have deferred taking some action on behalf of one client because of his obligation to other clients. This is particularly true in several specific respects.

A. Counsel's perception would have precluded effective pretrial negotiation.

An effective defense counsel has the *duty* to explore disposition without trial whenever he or she believes that the facts and circumstances warrant such negotiation, American Bar Association Project on Standards for Criminal Justice, *Standards Relating to the Defense Function*, Standard 6.1. In codefendant cases it is not at all unusual for the prosecution to offer a reduction of the charge against one defendant in return for that defendant's testimony against the others. Indeed, a competent defense counsel would pursue such agreement after reviewing the facts and determining that either one defendant was

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[1] *Amicus* makes this assumption throughout this brief, and notes that the Arkansas Court referred to counsel as "a very honorable man and competent lawyer," *Holloway v. State*, 539 S.W. 2d 435, 441 (Ark. 1976). *Amicus* recognizes that the result might well be different if a request for change of counsel was made in an effort to delay proceedings or impede justice.

clearly less culpable than the others, had a less substantial prior record, or was in a better strategic position than the other defendant(s). Here, however, Attorney Hall was precluded from seeking such an arrangement because he would, in effect, be supplying the prosecution with evidence against his own client. He could hardly go to the prosecutor and offer to have defendant "A" turn State's evidence against defendants "B" and "C" if he was representing all three men at the same time. In view of the conflict inherent in the situation, the *proof* of such ineffective representation could not be shown because the conflict in and of itself precluded entry into such negotiations and the development of the complete record.

B. Counsel's representation of codefendants precluded him from disclosing all of the facts known to him about the offense.

A defense counsel has the obligation not only to investigate the circumstances of the case, *A.B.A. Standards Relating to the Defense Function*, Standard 4.1, but to inform his client of all the developments in the case, *ibid.*, Standard 3.8. Counsel's obligations to the defendant are the same whether he has been appointed or retained, *ibid.*, Standard 3.9. The first thing any attorney would do to investigate the offense is to take a detailed, confidential statement from his or her client(s). It at once becomes apparent that counsel cannot share the facts learned from defendant "A" with defendants "B" or "C" and vice versa. In the instant case, for example, defendant Campbell asserted that he was under the influence of drugs and alcohol at the time of the offense. If this is true, it is entirely possible that defendants Holloway and Welch would know more about Campbell's involvement than Campbell himself. If counsel gained knowledge of Campbell's involvement from Welch or Holloway, he could not share

that information with Campbell. It might well be that the codefendants would be the only people who would be able to exonerate Campbell, but counsel would be precluded from informing Campbell of such confidential information.

Similarly, counsel is placed in a very difficult position to investigate leads provided by one client which may incriminate or exonerate another of his clients. For example, defendant "A" provides counsel with information which, when investigated, reveals that "A" is actually not guilty, but defendant "B" was involved. Conversely, the information supplied by "A" might turn out to actually be adverse to him, but helpful to "B" and/or "C". In either case counsel would be restricted from commingling the information because it has been gained in the course of three separate attorney-client relationships.

For reasons which will be developed below, it is not appropriate for counsel to inform the trial court of this conflict when it does exist, but often the conflict itself will prevent or, at the very least, deter counsel from pursuing areas of possible conflict so he cannot actually be certain what additional interviews and investigation would reveal. Such a conflict almost certainly will "chill" counsel's vigorous representation. He will tread lightly when interviewing one client for fear that client "A" will say something about "B" or "C".

In the instant case each defendant moved, *prior to trial*, for both severance and the appointment of separate counsel. It is apparent that early in the proceedings the conflict became apparent to counsel and his clients, the petitioners. The conflict itself, even without the showing of specific instances of conflict, was of such a nature as to deny each defendant his right to vigorous, zealous, and independent counsel who would investigate all of the facts, inform his client of all the circumstances surrounding the

case, and ultimately assist that client in deciding how to plead and how to approach the case.

C. The enforced representation of all three defendants by a single public defender denied each defendant effective representation at trial.

The Arkansas Supreme Court concluded that the defendants were not prejudiced by being represented by a single attorney for the following reasons:

> ". . . all three appellants voluntarily took the stand, *against* the advice of counsel, and denied any involvement in the crime. Most important, however, *none* of the appellants attempted to incriminate any of the others. Campbell completely denied making the statement to the officers, and denied even knowing Holloway at all. Holloway and Welch both stated that they knew nothing about the case," at 539 S.W. 2d 441 (original emphasis).

The N.L.A.D.A. submits that this analysis is inadequate for several reasons. It assumes that the only type of conflict would be if one defendant incriminated the other(s). This, we submit, is the critical flaw in the state court's reasoning. The Arkansas Court assumed that the defendants were either all guilty or all not guilty, but those are certainly not the only alternatives. Let us assume, for example, that Holloway and Welch *really* had no involvement with the offense, but that Campbell did. Holloway and Welch would be in no position to incriminate Campbell because they do not know anything about the offense, nor would Campbell incriminate the others because he denies any involvement in the offense. In the

course of his investigation and preparation for the case, counsel may have discovered many inconsistencies in Campbell's story and may have ascertained evidence which would tend to make Campbell's story appear less credible. Clearly defense counsel would be in no position to cross-examine Campbell on these matters at trial. Moreover, since Campbell's confession inculpates both Holloway and Welch, counsel for those defendants has an obvious interest in, first, casting doubt upon Campbell's credibility and, second, demonstrating some motive on Campbell's part to falsely involve the other two men.

The old adage about there being no honor among thieves has enough validity to allow one to note that often codefendants will assert that the other defendant who involved them has ulterior motives. This is exactly the type of conflict which could not be identified prior to trial because cross-examination of witnesses regarding prior inconsistent statements, prejudicial motives, and adverse evidence is a trial function, and would be highly diluted if counsel went over with his client those areas in which he will cross-examine his client on behalf of a second or third client.

Indeed, that is precisely what happened in this case. Mr. Hall informed the trial court that he was unable to protect all of his clients' rights and that he could not cross-examine his own clients, *see* 539 S.W. 2d 442-443.

The result of the trial court's action in this case was to virtually require that the jury reach the same verdict as to each defendant. Due to the nature of the representation afforded the defendants they were each unable to develop facts adverse to the other defendants, to cross-examine the other defendants, or to advance any claim which might exonerate one or two defendants without exonerating all three. Counsel was placed in an irreconcilable position, and

he should not have been required to represent all three defendants. The result was that all three defendants were denied the zealous, independent, and professional skills to which they are entitled under the Sixth and Fourteenth Amendments to the Constitution. [2]

D. The defendants were each denied effective representation in relation to sentencing.

Under the law in effect at the time of the offense involved in this case, the petitioners received the maximum sentences. Under Arkansas law a person convicted of robbery could be sentenced to a term not less than 3 nor more than 21 years in prison, *Arkansas Criminal Code*

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[2] N.L.A.D.A. would also suggest that the fact that Campbell gave a confession involving the other two defendants, while the other two gave no statement, warranted appointment of separate counsel for much the same reasons as those which underlie the Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968). There this Court reversed a conviction finding that Bruton had been denied his right to confrontation when his codefendant's statement, which inculpated Bruton, was introduced at a joint trial, when Bruton did not testify at trial. Here Holloway and Welch were equally denied their right to confrontation to attack that part of the confession involving them, while suggesting that Campbell himself, or with other unknown persons, committed the offenses. The defendants were thus not only provided ineffective counsel, but were also denied confrontation of either of the other defendants and the right to cross-examine the other defendants. They were forced to "hang together."

(1975), Sec. 41-3602. It is apparent that the jury [3] did not differentiate between the defendants as to penalty or as to culpability. The N.L.A.D.A. respectfully submits that by refusing to appoint separate counsel for each defendant, the courts below denied the defendants effective representation at the time of sentencing.

This precise question was considered by the California Supreme Court in *People v. Chacon*, 69 Cal. 2d 765, 775, 73 Cal. Rptr. 10, 447 P. 2d 106 (1968), where Mr. Justice Traynor, writing for the Court, observed:

> "Conflicts of interest necessarily exist when the jury must fix the penalty for more than one defendant. Often the strongest argument that separate counsel can make on the issue of penalty is that his client was less culpable than the others and that he, at least, should not be executed. In addition, he must be free to stress particular mitigating elements in his client's background or other individual mitigating factors that may not apply to a codefendant. Counsel representing more than one defendant is necessarily inhibited in making such arguments and in presenting evidence to support them. He cannot simultaneously argue with any semblance of effectiveness that each defendant is most deserving of the lesser penalty."

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[3] Under applicable Arkansas law, the jury fixes sentence, and the trial court intervenes only in the event the jury is unable to agree on the punishment, *Arkansas Criminal Code*, Secs. 43-2145-2146, 43-2306 (1975).

It is also relevant to consider the statement of the Wisconsin Supreme Court in *Hall v. State*, 63 Wis. 2d 304, 313, 217 N.W. 2d 352 (1974), on the question of the prejudice which might attach to having one attorney represent more than one defendant at sentencing:

> "It is indeed true, as the state asserts, the record does not demonstrate any actual prejudice. Had the representation been fully effective and by separate counsel, the court might well have imposed the same sentence, but as the California court said in *People v. Gallardo* (1969), 269 Cal. App. 2d 86, 90, 74 Cal. Rptr. 572:
>
> '[I]t is usually the very error of not appointing separate counsel which makes it so difficult for the defendants to point to tangible evidence of prejudice.' "

In the instant case it would clearly have been impossible for defense counsel to suggest to the jury that one defendant was more culpable than any other. By requiring that Mr. Hall represent all defendants, the courts below restricted his ability to vigorously argue mitigation in relation to sentencing, and thus denied the defendants their right to effective representation at that critical stage of the proceedings, *Mempa v. Rhay*, 389 U.S. 128 (1967).

II. It Is Neither Necessary Nor Appropriate For Defense Counsel To Identify The Conflict Of Interest To The Trial Court Before The Defendants Are Entitled To Representation By Separate Counsel.

A. The issue is the attorney's honest, but subjective, belief.

A review of the Code of Professional Responsibility adopted by the American Bar Association reveals that an attorney's *obligation* is to withdraw from a case when he believes that there is a conflict between representation of multiple clients. It is clear from a reading of the Ethical Considerations relating to Canon 5 of the Code of Professional Responsibility that no actual conflict is required:

> "*Interests of Multiple Clients*
>
> EC 5—14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.
>
> EC 5—15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or con-

tinues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.

. . .

EC 5—17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case . . .."

The N.L.A.D.A. strongly believes that the ethical obligations of public defenders and assigned counsel are exactly the same as privately retained counsel, and that our clients are entitled to the same type of independent, professional judgment as a wealthy person who is able to retain an attorney.

With this in mind, it is at once apparent that the Arkansas Court's suggestion that defense counsel allow the trial court to determine whether there is an actual conflict is not appropriate. The issue is not whether a judge would find an actual conflict, but whether counsel honestly believes that representation of multiple defendants "will adversely affect his judgment on behalf of or dilute his loyalty to a client." Only the attorney him- or herself is able

to answer that question. All the reviewing court can do is make a factual determination that there is no actual conflict such as to require appointment of separate counsel. That should not be the issue. Indeed, the California appellate court reached this precise result in *Uhl v. Municipal Court*, 37 C.A. 3d 526, 112 Cal. Rptr. 478 (1974), wherein the Court concluded that when a public defender gives a trial court his assurance that a conflict exists among defendants that he or she need not inform the court of the factual nature of the conflict. The California Court further found that such multiple representation by one public defender raised not only serious constitutional questions, but ethical problems as well which precluded such multiple representation.

B. It is often impossible to identify specific conflicts until very near the date of trial.

As suggested in the initial section of this brief, often an attorney will refrain from pursuing an investigation or interview because of the inherent conflict which may exist between defendants. The possible conflict will deter counsel from pursuing some lines of defense and some areas of investigation because of the latent conflict of interest. Moreover, it is likely that actual conflicts may not arise until very near the scheduled date of trial at which time the prosecutor begins to seriously consider offering a reduced charge to one defendant, or when one defendant begins to change his story in the hopes of gaining some new consideration. It is at the period immediately prior to trial that defense counsel is going to spend the most time on witness preparation, investigation, and development of strategy.

Adoption of the process identified by the Arkansas Court would result in many trials being delayed precisely because of the need for an eleventh-hour change of counsel.

Such a result not only constitutes a denial of such defendants' right to a speedy trial, but violates the public's right to have criminal cases promptly disposed of.

C. Revelation of any confidential information would be a gross violation of an attorney's ethical obligations.

The most obvious response to the argument that defense counsel is obligated to inform the court of the factual basis for his claim of privilege is that such a rule would almost certainly require the attorney to violate the confidences and secrets of a client, in specific violation of Canon 4 of the Code of Professional Responsibility. Even recognizing that an exception to the rule is that "A lawyer may reveal . . . confidences or secrets when . . . required by court order," DR 4-101(C)(2), it is not at all clear that this exception covers the instant facts. Even if it does, however, such a requirement would completely destroy the attorney-client relationship which the privilege is designed to foster.

Adoption of the procedure specified by the Arkansas Court would relegate court-assigned counsel to a different level of representation. It is bad enough that public defenders are often considered second-class lawyers by our clients, and often perceived as being part of the prosecutorial system. Under the Arkansas Supreme Court's decision, a court-appointed attorney can never be certain in a multiple defendant situation whether or not the information he has received from a client will remain confidential.

D. Disclosing information to the court would be inherently prejudicial to the defense.

1. If done in open court, in the presence of the prosecution.

In most situations the conflict which arises is either that one defendant implicates another or that the culpability of one defendant is vastly less or greater than the others. There might also be conflicting defenses. In a rape case, for example, one defendant might assert "consent" as a defense, while the second might assert he was not involved at all. In any of these situations it seems difficult to believe that defense counsel would be required to inform the prosecution of such confidential information. It would place defense counsel in the position of proving the State's case, or providing the prosecution with substantial ammunition to attack the defendants' case. Under any circumstances the prosecution cannot be allowed to ascertain the basis for counsel's request to withdraw.

2. If done *in camera*.

Even if the prosecution does not know of the confidential information which forms the basis for an assertion of conflict, the defendant is prejudiced simply if the trial judge is aware of the factors which lead counsel to seek withdrawal. The most obvious problem is that in most jurisdictions the judge will ultimately pass sentence upon the defendants and will quite likely be influenced if defense counsel has informed the court that one of the defendants is more or less culpable than the others. A court would certainly consider the culpability of each defendant in passing sentence. If counsel has informed the court that one of his clients is more responsible for the offense than the other defendants, this will almost certainly enter into

the court's consideration at the time of sentencing. Thus, confidential information given under the assumption of the attorney-client privilege is being used directly against one or more of the defendants.

Secondly, the confidential information may reflect on one of the defendant's credibility in a situation, as the present case, in which the court is called upon to make a factual determination which depends on a credibility determination. In this case the judge made a determination that the statement of Campbell was admissible at trial, and the Arkansas Supreme Court indicated in its decision that such a determination "posed an issue of credibility for the trial court," at 539 S.W. 2d 441.

In the course of a trial there are many points at which the judge's knowledge of confidential information gained from defense counsel, which may include knowledge of the defense strategy and the weaknesses of the defense case, will have a bearing on the court's ruling on evidentiary objections, procedural points, and the like.

The fairest judge is still human. He or she cannot forget the information provided *in camera*. There is a basic prejudice to the defendant by this procedure.

E. Such a procedure would make appellate review impossible.

In conclusion, N.L.A.D.A. submits that it would be virtually impossible to have appellate review of a decision denying the appointment of separate counsel if the defense counsel is to provide the trial court *ex parte in camera* information on the facts underlying his request for the appointment of counsel. Even assuming that it is somehow possible to make a record on the factual basis and to transmit the record under seal to the appellate state court

or the federal court for collateral review, how can the case be briefed or decided? Obviously counsel for the State could not have access to the confidential information because there would be the possibility of a new trial in the event the appellate court reversed, and thus the review would have to be, again, *ex parte* and *in camera*. The appellate court could not issue a decision because to do so would again violate the confidences involved. Even if the appellate court affirmed the trial court's decision, the information would still be confidential and could not be set forth in any public document.

III. No *Per Se* Prohibition Is Advocated, But The Decision Should Rest With Counsel And Defendant.

N.L.A.D.A. does not advocate a rule whereby any attorney would be prohibited from representing multiple defendants in a criminal action. In fact, we strongly oppose such a determination. Rather, we agree with the Court of Appeals for the Seventh Circuit "that the primary responsibility for the ascertainment and avoidance of conflict situations must lie with the members of the bar," *United States ex rel. Robinson v. Housewright*, 525 F. 2d 988, 994 (7th Cir. 1975). Similarly N.L.A.D.A. does not seek adoption of the rule of *Lollar v. United States*, 376 F. 2d 243 (D.C. Cir. 1967), which places the burden to determine conflict upon the trial judge; again, we oppose the rule of the District of Columbia Circuit.

The basic position of N.L.A.D.A. is that the duty to ascertain conflict is on defense counsel. If counsel believes that there is a conflict, or potential conflict, he is obligated to disclose such a conflict to each defendant. Unless each defendant waives his right to separate counsel, the appointing court must then appoint separate counsel at the request of the attorney without the need for further

inquiry. The defendants may, however, waive their rights to be represented by separate attorneys.[4]

N.L.A.D.A. submits that the court cannot force an attorney to withdraw from a case in which both the attorney and defendant(s) have waived any potential conflict.[5] N.L.A.D.A. would, therefore, support the very recent decision of the New Jersey Supreme Court in *State v. Land*, March 25, 1977, 21 Cr. L. 2107, 2108:

> "In all cases where an attorney represents more than one defendant, the trial court ought to advise the parties of their constitutional right. This should be accomplished as soon as the trial court is alerted to the existence of multiple representation and feasibly may bring the matter to the attention of the

[4] *In accord: Campbell v. United States*, 352 F. 2d 359 (D.C. Cir. 1965); *United States v. Garcia*, 517 F. 2d 272 (5th Cir. 1975); *United States v. Armedo-Sarmiento*, 524 F. 2d 591 (2nd Cir. 1975); *United States ex rel. Hart v. Davenport*, 478 F. 2d 203, 211 (3rd Cir. 1973); *United States v. Foster*, 469 F. 2d 1, 4 (1st Cir. 1972); *Larry Buffalo Chief v. South Dakota*, 425 F. 2d 271 (8th Cir. 1970); and *Craig v. United States*, 217 F. 2d 355 (6th Cir. 1954).

[5] A court may have more power to order separate counsel, over a party's objection, when the question is representation before a grand jury rather than trial representation, *see Pirillo v. Takiff*, 341 A. 2d 896 (Pa. 1975), *appeal dismissed, cert. denied*, 352 A. 2d 11 (Pa. 1976), *appeal dismissed, cert. denied*, 96 S. Ct. 873; *In re: Investigation Before the April 1975 Grand Jury*, 531 F. 2d 600 (D. C. Cir. 1976).

> defendants and counsel. The defendants may waive those rights, but the trial judge must make certain on the record that the defendants understandingly and knowingly have decided to forego separate counsel."

This properly puts the initial burden on the attorney and the defendants. When counsel and/or the defendants request separate counsel, that request should be granted as a matter of course.

CONCLUSION

For the reasons set forth herein, the National Legal Aid and Defender Association submits that the failure of the courts below to require separate counsel to represent each defendant resulted in each of the petitioners being denied his constitutional right to effective representation by legal counsel. For this reason N.L.A.D.A. supports petitioners' request that the judgment of the Arkansas Supreme Court be reversed and the cause remanded with directions to grant the petitioners separate counsel at new trials.

Respectfully submitted,

HOWARD B. EISENBERG
State Public Defender
State of Wisconsin
123 West Washington Avenue
Main Floor
Madison, Wisconsin 53702
(608) 266-3440

Counsel for N.L.A.D.A. as Amicus Curiae.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5856

WINSTON M. HOLLOWAY,
RAY LEE WELCH
and
GARY DON CAMPBELL,

Petitioners,

vs.

STATE OF ARKANSAS,

Respondent.

On Writ of Certiorari
to the Supreme Court of Arkansas

BRIEF OF THE OFFICE OF THE COLORADO STATE PUBLIC DEFENDER AS AMICUS CURIAE

ROLLIE R. ROGERS
JAMES F. DUMAS, JR.
THOMAS M. VAN CLEAVE III
1575 Sherman Street
Suite 718
Denver, Colorado 80203
303/892-2661

Counsel for Amicus Curiae
OFFICE OF THE COLORADO
STATE PUBLIC DEFENDER

TABLE OF CONTENTS

TABLE OF CASES CITED

STATUTE CITED

OTHER AUTHORITIES

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BRIEF OF THE
OFFICE OF THE COLORADO STATE PUBLIC DEFENDER
AS AMICUS CURIAE

The office of the Colorado State Public Defender files this brief as Amicus Curiae pursuant to the written consent of the parties whose consents have previously been filed with the Clerk of the Supreme Court.

INTEREST OF AMICUS CURIAE

(1) The Office of the Colorado State Public Defender is a statutorily created agency of the State of Colorado.[1] Under

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[1] See Title 21, Colorado Revised Statutes (1973).

the statute the sole responsibility for the administration of the Office is vested in the State Public Defender. The State Public Defender employs deputy and assistant public defenders who serve at his pleasure, and establishes such regional offices necessary to carry out his duties. The Office of the State Public Defender has the duty of representing indigent persons accused of felonies, misdemeanors, juvenile delinquency, and involved in mental health proceedings, and appellate and post-conviction proceedings. Under the statute the courts of Colorado have the authority to appoint, on their own motion, the Office of the State Public Defender to represent indigent persons.

(2) During the course of fulfilling its statutory duties, the Office of the State Public Defender has been appointed to represent more than one of several codefendants accused of the same offense. This has taken the form of the same deputy state public defender representing more than one codefendant; different deputy state public defenders from the same regional office representing multiple codefendants; and different deputy state public defenders from different regional offices representing multiple codefendants. It is the position of the Colorado State Public Defender that, in view of the statutory scheme under which the Office operates, the representation of multiple codefendants by one or more deputy state public defenders violates the constitutional rights of the codefendants to the effective assistance of counsel, and further that such joint representation subjects the deputy state public defenders involved to possible disciplinary action under the Code of Professional Responsibility.

(3) The issue involved in this case is of concern to indigent criminal defendants in the State of Colorado.

OPINION BELOW

The Opinion of the Arkansas Supreme Court under the caption of *Holloway v. State* is reported at ____ Ark. ____, 539 S.W.2d 435 (1976).

JURISDICTION

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Whether the representation of multiple codefendants having conflicting interests by the same attorney deprives one or more of the codefendants of their right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

SUMMARY OF THE ARGUMENT

The Sixth and Fourteenth Amendments to the United States Constitution guarantee to criminal defendants the right to the effective assistance of counsel for their defense. Representation of multiple codefendants having conflicting interests by the same attorney deprives them of that fundamental constitutional right. Additionally the ethical requirements imposed by the Code of Professional Responsibility render it virtually impossible for an attorney to represent

multiple codefendants in a criminal case and still maintain compliance with the ethical requirements of the Code. To the extent a court-appointed attorney is ordered to represent multiple codefendants in a criminal case, the codefendants' Fourteenth Amendment constitutional right to equal protection of the laws may well be violated, since a retained attorney, without court sanction to violate ethical considerations, would be able to represent only one of the codefendants.

ARGUMENT

THE REPRESENTATION OF THE PETITIONERS WITH CONFLICTING INTERESTS BY THE SAME ATTORNEY DEPRIVED THEM OF THEIR CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee to a criminally accused the effective assistance of counsel for his defense. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). Where one attorney is appointed to represent multiple codefendants having conflicting interests, that constitutional guarantee, which "contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests," is violated. *Glasser v. United States*, 315 U.S. 60, 70 (1942). In the instant case where counsel for the Petitioners was impaired in his cross-examination of each Petitioner's codefendants by the fact of his joint representation of all of them, the conflict of interest caused thereby deprived Petitioners of their constitutional right to the effective assistance of counsel. *Glasser v. United States, supra; Holland v. Henderson*, 460 F.2d 978 (5th Cir. 1972). See also, *Morgan v. United States*, 396 F.2d 110 (2d. Cir. 1968).

While it is clear that in the instant case the conflicting interests among the several codefendants precluded them from obtaining the effective assistance of counsel, the majority opinion of the Arkansas Supreme Court points up a

pernicious problem in this area: the attempt by various courts to determine whether "prejudice" resulted from the conflict of interest, and if so, whether the prejudice was sufficient to render the representation ineffective. See, *e.g., United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976); *United States v. Gaines*, 529 F.2d 1038 (7th Cir. 1976); *United States v. Christopher*, 488 F.2d 849 (9th Cir. 1973); *Fryar v. United States*, 404 F.2d 1071 (10th Cir. 1968). However, these decisions appear to ignore the rather specific language of this Court in *Glasser v. United States, supra*:

> Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.
>
> To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

315 U.S. at 75-76.

Unfortunately, by requiring a showing of prejudice and then indulging in "nice calculations" as to the amount of prejudice required to render representation ineffective, a myriad of diverse and irreconcilable standards have evolved. Some of the different standards involve differences primarily of semantics. Thus, while some courts require a showing of "prejudice," see *United States v. Carrigan, supra; United States v. Gaines, supra; United States v. Christopher, supra; Fryar v. United States, supra,* in the Fifth Circuit where there is a showing of "actual, significant conflict," prejudice need not be shown. See *United States v. Huntley*, 535 F.2d 1400 (5th Cir. 1976); *Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974). And in the District of Columbia and Third Circuits, the courts appear to use the terms "prejudice" and "conflict of interest" synonymously. See *United States ex rel. Hart v. Davenport*, 478 F.2d 203 (3d Cir. 1973); *Lollar v. United*

States, 376 F.2d 243 (D.C. Cir. 1967). Further confusing the issue are the different degrees of prejudice or conflict of interest required by the various courts to render representation ineffective. See, *e.g., United States v. Carrigan, supra* (in the absence of judicial inquiry as to the conflict, the burden is upon the prosecution to prove lack of prejudice); accord: *United States v. Foster,* 469 F.2d 1 (1st Cir. 1972). *United States ex. rel Hart v. Davenport, supra* (upon a showing of a possible conflict of interest or prejudice, however remote, joint representation is regarded as constitutionally defective).

The foregoing cases illustrate but a few of the various courts' attempts to make "nice calculations as to the amount of prejudice" necessitating a reversal on the basis of ineffective representation resulting from conflicting interests. The result has been utter confusion and prolific litigation. To restore order to the confusion and put an end to the unnecessary litigation, only a simple rule is necessary: absent waiver, require separate counsel for each codefendant. This is not really a completely novel approach:

> It has become increasingly clear that the only way to ensure adequate representation for each defendant in a multi-defendant case is the initiative of the court to require separate counsel as soon as the court is aware of such a situation. The adoption of a rule by each district court, or by action of the court of appeals for the circuit, would solve the problem. . . .
>
> . . . .
>
> Our burgeoning criminal calendars and the need to try a larger percentage of criminal cases under the provisions of the Speedy Trial Act and court rules for the prompt disposition of criminal cases have made it all the more necessary for our federal trial courts to take all measures to avoid the necessity for the retrial of multi-defendant cases. One such measure is to require separate counsel for each defendant in a multi-defendant case.

United States v. Carrigan, supra, 543 F.2d at 1058 (Lumbard, J., concurring). See also, Note: *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel,* 58 Geo. L. J. 369 (1969).

Arriving at the same conclusion, based as much upon ethical considerations as the constitutional standard for effective representation is the American Bar Association Project on Standards for Criminal Justice:

> Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

ABA Standards for Criminal Justice, Standards Relating to the Defense Function, §3.5(b), at 211 (1971).

Underlying this section is the recognition of the fundamental fact that in virtually every criminal case involving multiple codefendants there will be at least one phase where their interests conflict. The Commentary to section 3.5(b) notes some of the situations where conflicts frequently occur:

> Beyond the obligation of disclosure, there are situations in which the lawyer's independent representation of his client is so inhibited by conflicting interests that even full disclosure and consent of the client may not be an adequate protection. ABA Code DR 6-106. In criminal cases this most frequently occurs where the lawyer undertakes the defense of more than one co-defendant. In many instances a given course of action may be

> advantageous to one of the defendants but not necessarily to the other. The prosecutor may be inclined to accept a guilty plea from one of the co-defendants, either to a lesser offense or with a lesser penalty or other considerations; but this might harm the interests of the other defendant. The contrast in the dispositions of their cases may have a harmful impact on the remaining defendant; the one who pleads guilty might even, as part of the plea agreement, consent to testify against the co-defendant. Moreover, the very fact of multiple representation makes it impossible to assure the accused that his statements to the lawyer are given in full confidence. Defense counsel necessarily must confront each with any conflicting statements made by the other in the course of planning the defense of the cases. In this situation he may find that he must "judge" his clients to determine which is telling the truth, and his role as advocate would inevitably be undermined as to one if not both defendants.

ABA Standards, supra, at 213-14.

As is recognized by the *Standards, supra*, ethical requirements render the representation of multiple codefendants perilous to the attorney involved and at the same time compound the Sixth Amendment problems for the codefendants. The American Bar Association Code of Professional Responsibility (1969)[1] requires that:

> A lawyer should preserve the confidences and secrets of a client. (Canon 4)
>
> A lawyer should exercise independent professional judgment on behalf of a client. (Canon 5)
>
> A lawyer should represent a client competently. (Canon 6)
>
> A lawyer should represent a client zealously within the bounds of the law. (Canon 7)

[1] Adopted by the Colorado Supreme Court, August 20, 1970. Colorado Revised Statutes, vol. 7, at 617.

> A lawyer should avoid even the appearance of professional impropriety. (Canon 9)

Disciplinary Rule 5-105 is quite specific:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
>
> (D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Ethical Consideration 5-14 amplifies somewhat the requirements of DR 5-105:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

The problem of strict compliance with ethical requirements is especially acute where attorneys are appointed by the court. For while retained counsel may simply decline to

represent more than one codefendant, an attorney appointed to represent multiple codefendants may withdraw only with permission of the court. If the court refuses to allow counsel to withdraw, his only remaining choice – other than risk being held in contempt of court – is which Canon he will violate, albeit with the court's sanction. Where appointed counsel are employed by a public defender office the ethical dilemma is not diminished where separate counsel from the same office, or from different offices in a unitary system, are appointed, since the knowledge and actions of each attorney are imputed to all others in the same office. See Disciplinary Rule 5-105(D) *supra*; ABA Comm. on Professional Ethics, Opinions, No. 33 (1931). See also, *Olds v. State*, 302 So. 2d 787 (Dist. Ct. App. Fla. 1974). The Office of the Colorado State Public Defender has been confronted with this situation on several occasions, where the courts of this jurisdiction have appointed different deputy state public defenders from the same or different regional offices to represent codefendants in the same case. Usually the courts have permitted withdrawal and have appointed counsel from outside the Public Defender Office to represent the conflicting codefendants. See *Allen v. District Court*, 184 Colo. 202, 519 P.2d 351 (1974). However, a decision by this Court which in any way sanctions the joint representation of multiple codefendants would seriously undermine the ability of the Office of the Colorado State Public Defender to obtain leave to withdraw in such cases.

The ethical standards involved may also pose questions of constitutional dimension in areas other than the Sixth Amendment. To the extent that retained counsel may refuse to represent more than one codefendant in the same case because of ethical considerations, while appointed counsel may not, any detriment suffered by the codefendants represented by appointed counsel as the result of the joint representation may violate their right to equal protection of the laws under the Fourteenth Amendment to the Constitution. *Tate v. Short*, 401 U.S. 395 (1971);*Williams v. Illinois* 399 U.S. 235 (1970); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

CONCLUSION

The law is clear that the joint representation of multiple codefendants having conflicting interests deprives one or more of the codefendants of their constitutional right to the effective assistance of counsel. The law is not so clear with respect to just what constitutes a conflict of interest, or a prejudicial conflict of interest, whichever term is utilized by a particular court. The confusion results from the courts' attempts to "indulge in nice calculations as to the amount of prejudice" resulting from such conflicts of interests. However, it is increasingly recognized, especially where ethical considerations are applied, that there is virtually no criminal case in which the interests of multiple codefendants do not clash at some point. Thus, the only real solution, and one which would decidedly promote judicial efficiency, is one which would require, in the absence of a valid waiver, the appointment of separate counsel in every criminal case involving multiple codefendants.

Respectfully submitted,

ROLLIE R. ROGERS
(A Member of the Bar of This Court)

JAMES F. DUMAS, JR.
THOMAS M. VAN CLEAVE III
1575 Sherman Street
Suite 718
Denver, Colorado
303/892-2661

Counsel for Amicus Curiae
THE OFFICE OF THE COLORADO
STATE PUBLIC DEFENDER